Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Petitioner,

-v-

HILDEN MENDEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the decision of the Second Circuit Court of Appeals, which, by a vote of 2-1, granted a writ of habeas corpus and reversed a State murder conviction based on a heretofore unknown category of *Brady* material (*Brady v. Maryland*, 373 U.S. 83 [1963])—namely, unsubstantiated hearsay that amounted to little more than rumor?

2. Did the Second Circuit Court of Appeals majority misstate the law, and dangerously extend *Kyles v. Whitley*, 514 U.S. 419 (1995), when it adopted a subjective standard of materiality, and reversed a State court murder conviction not because the suppressed information would, with reasonable probability, have resulted in a more favorable verdict, but because the court subjectively lacked "confidence" in the verdict despite the ample evidence of guilt?

3. Did the Second Circuit Court of Appeals majority undermine respect for State law and disregard the recently enacted habeas corpus statute by stating that 28 U.S.C. § 2254(e) was inapplicable to a fact-based *Brady* claim?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner (hereafter "the State") respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered on August 1, 2002, affirming the granting of a writ of habeas corpus to a State prisoner.

OPINIONS BELOW

The Court of Appeals opinion affirming the granting of the writ has not yet been published, but can be found at 2002 WL 1770537 (2d Cir. Aug. 1, 2002), No. 00-2548. The United States District Court decision and order, which adopted *in toto* a Magistrate's Report and Recommendation, and granted the writ, is unreported, but can be found at 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000), 98 CIV. 2652 (LMM). The Magistrate's Report and Recommendation is unreported, but can be found at 2000 WL 722613 (S.D.N.Y. Jun. 6, 2000), 98 CIV. 2652 (AJP). The decision of the State hearing court is unreported.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which provides that cases in the Court of Appeals may be reviewed by the Supreme Court by a writ of certiorari upon the petition of any party to any civil or criminal case, before or after rendition of judgment; and Rule 10(c) of this Court.

The judgment of the Court of Appeals for the Second Circuit was entered on August 1, 2002. This petition is timely filed pursuant to Supreme Court Rule 13(1) because it is filed within ninety days of the date of entry.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment, Section 1, of the United States Constitution provides, in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The State seeks review of a judgment of a United States Court of Appeals decision. The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 2254. The court's power to grant the writ derived from 28 U.S.C. § 2241.

The State Court Proceedings

The Trial

In 1992 Hilden Mendez was convicted of Murder in the Second Degree, Attempted Murder in the Second Degree, and related crimes. The conviction arose from a Saturday night bloodbath on a New York street, in which petitioner shot three unarmed men (one fatally). Albert Hayles died, but Johnny Rodriguez and Nelson Suarez survived to testify.

At Mr. Mendez's trial, Mr. Rodriguez and Mr. Suarez, the two survivors, testified that Mr. Mendez shot them. Both victims identified Mr. Mendez shortly after the crime. While hospitalized, one of the victims, Johnny Rodriguez, told police

that he recognized Mr. Mendez (whom he knew only as "Tony") from a previous shooting incident. Mr. Rodriguez, who was shot 18 times, identified Mr. Mendez's photograph in a photo array. The other shooting victim, Nelson Suarez, did not know Mr. Mendez. Mr. Suarez, who was shot only once, apparently by accident, identified Mr. Mendez in a lineup four days after the shooting. Mr. Rodriguez and Mr. Suarez, who were not friends, and were treated in different hospitals, had no chance to confer with each other before their respective identifications of Mr. Mendez.

Mr. Rodriguez and Mr. Suarez gave consistent descriptions of the shooter, as a slim, dark-skinned Dominican man in his twenties, with facial hair (a beard or moustache; Mr. Mendez had both). Their descriptions matched Mr. Mendez with the exception of (1) size and (2) age. Rodriguez and Suarez described the shooter as between 5 feet 2 inches and 5 feet 9 inches tall, weighing from 130 to 160 pounds. Mr. Mendez was 6 feet 2 inches tall, weighed 190 pounds, and was in his early thirties.

When Mr. Mendez was arrested, four days after the shooting, he was with a friend of his, Viterbo Abreu. Mr. Abreu told the police that, two days earlier, Mr. Mendez bragged to him about shooting two or three people in revenge for a previous attempt on his own life. According to Abreu, Mr. Mendez said "they had tried to kill him" and showed Mr. Abreu bullet holes in his two-door Toyota or Honda.

Mr. Mendez's defense was that he was mis-identified. This defense was based on the discrepancy between the shooter's reported height and weight, and Mr. Mendez's actual height and weight. The discrepancy was explored at length during the trial.

However, the defense never suggested that Mr. Rodriguez and Mr. Suarez, who were victims, had any motive to lie. The defense never suggested that Mr. Rodriguez or Mr. Suarez had any grudge or bias against Mr. Mendez (apart from having been shot by him). There was no suggestion that either victim had a "deal" with prosecutors that influenced his testimony. Although Mr. Mendez was arrested and identified only four days after the crime, the defense did not present an alibi.

Shortly after the shooting, two additional potential eyewitnesses told the police that they did not see the shooting and could not identify the shooter. These additional potential eyewitnesses, David Pacheco and Gustavo Guerra, completely refused to talk to the police about what occurred. However, Mr. Pacheco and Mr. Guerra unexpectedly came forward during the trial to testify that they actually had seen the shooting. Mr. Pacheco and Mr. Guerra testified that there was one shooter and one gun. However, they said, Mr. Mendez was not the shooter.

The parties agreed that the many discharged shells recovered at the murder scene were fired from one pistol; and that all of the bullets recovered at the scene or during medical or autopsy procedures were consistent with having been fired from the same pistol.

The *Brady* Hearing

While Mr. Mendez's State appeal was pending decision, Robert Moore, the State prosecutor who handled the appeal, found a hand-written note in Mr. Mendez's case file that he thought had exculpatory value. The note was dated six months after Mr. Mendez's arrest, and had been written by a former prosecutor on the case named Sharlene Brown. The note stated in pertinent part:

> I received a call from Det. Willie Martinez that he received information from officers in Va. that 2 individuals who they have under arrest stated that an individual named Oswaldo D. Rodriguez put out a hit (ordered the killing) of Johnny Rodriguez [the victim shot 18 times]. Oswaldo ordered the hit because he believed that Johnny stole his money & purchased a Mercedes. Oswaldo now resides in Santo Domingo & still wants Johnny dead. I told Det. Martinez to notify Johnny of the possible danger to his life.

Mr. Moore believed that the rumored existence of a person with an alternative motive for killing Johnny Rodriguez had exculpatory value. Mr. Moore followed up by contacting the Virginia detectives, and obtaining their memoranda. He then disclosed to Mr. Mendez's attorneys the note in the file and the Virginia detectives' memoranda.

The Virginia memoranda were based on debriefings of three incarcerated suspects charged with narcotics crimes. Two of these suspects stated, in essence, that Oswaldo Rodriguez, a wealthy drug dealer, had bragged about arranging to have Johnny Rodriguez killed. These suspects said that Oswaldo bragged that he ordered a "hit" from his drug supplier, Alfredo Matos, "who had the people to do" the job. According to Oswaldo Rodriguez, "four hit men known as 'Machederos,' a street gang in the Dominican Republic," working for Matos, did the job and sprayed the street with bullets. Oswaldo Rodriguez allegedly paid off one of the hit men, who was driving a blue Toyota Celica with New York plates.

The third Virginia suspect said he was "unware of any violence committed by Oswaldo." Rather, he had been told by Oswaldo that "someone shot the guy who struck his mother."

None of the Virginia suspects knew the names of any of the four alleged hit men, none had witnessed the crime, none had met or seen the alleged hit men, and none could describe them.

The trial judge ordered a hearing to resolve whether the newly obtained statements of the suspects in Virginia were exculpatory vis-a-vis Mr. Mendez, and whether they required reversal under *Brady v. Maryland*, 373 U.S. 83 (1963). At the hearing, Carol Sharpe, the prosecutor who tried Mr. Mendez, recalled finding Ms. Brown's note in the file. Ms. Sharpe testified that, on her inquiry about the note, Detective Martinez told her that the "information didn't check out" (Hearing Tr. 15-16, 31-32). She testified that, on her inquiry, Johnny Rodriguez admitted to her that Mr. Mendez had been the intended victim of "a shoot out" a few weeks earlier. Johnny Rodriguez said that Mendez's motive for shooting him was revenge. Mr. Rodriguez said that he had recognized Mr. Mendez from the earlier shoot-out, and knew Mr. Mendez's nickname to be "Tony." Mr. Rodriguez said that he had "no knowledge" of a hit put out by Oswaldo Rodriguez (Hearing Tr. 17, 25-28).

Associates of Oswaldo Rodriguez testified and confirmed that there was a burglary of Oswaldo's mother's apartment; that Oswaldo suspected "a guy named Johnny" of the burglary; and that Oswaldo bragged that four of Matos' friends "took care of it, of shooting Johnny." However, none of the associates knew the names of the four alleged hit men; none had ever seen any of the four alleged hit men; and none had any description of the alleged hit men.

The State Court Decision

Citing *Brady v. Maryland*, 373 U.S. at 83, the State trial court held that the information regarding Oswaldo Rodriguez was a "possible investigatory lead" that did "not in any way tend to

exculpate" Mr. Mendez. The State court wrote, "It is entirely possible that this lead is totally unrelated to the incident involving this defendant, or that this defendant was, in fact, carrying out the purported 'hit.'" The trial court also remarked that, under New York law, the "admissibility at trial" of Oswaldo's reported statements was "extremely doubtful."

The State appellate court, which had already heard and decided the direct appeal of Mr. Mendez's case, denied leave to appeal this decision, stating, "[T]here is no question of law or fact presented which ought to be reviewed."

The Habeas Corpus Petition

The Magistrate's Report and Recommendation

On habeas corpus review, Magistrate Judge Andrew J. Peck held that Oswaldo Rodriguez's reported statements were exculpatory and material under *Brady*. Magistrate Peck recommended that a writ of habeas corpus be issued.

Magistrate Peck apparently believed that Mr. Mendez was innocent, and that the shooter was one of four unrelated hit men hired by Oswaldo Rodriguez; all of his conclusions flowed from this belief.

To Magistrate Peck, the unsubstantiated hearsay regarding Oswaldo's boasts was exculpatory of Mr. Mendez. Magistrate Peck brushed aside the State's evidence. Magistrate Peck stated as fact that Alfredo Matos "was the only person who could positively identify the shooter or shooters" – completely discounting or disregarding the two victims who identified Mr. Mendez shortly after the shooting, and identified him at trial, and discounting Abreu's testimony about Mendez's confession (p. 59a). Similarly, Magistrate Peck wrote disparagingly that "the State's only evidence of Mendez's guilt was two

eyewitnesses, Johnny Rodriguez and Suarez, who immediately after they were shot gave descriptions of the shooter which did not fit Mendez" (p. 64a, and see p. 50a, fn. 9). Revealingly, the Magistrate wrote that "[i]nformation about who actually carried out the hit on Johnny Rodriguez" contradicted the prosecution's case (p. 59a) (emphasis supplied). The Magistrate invented the entirely unsupported idea that Matos had "firsthand" knowledge of "Oswaldo's hit on Johnny Rodriguez" (p. 59a).

Magistrate Peck ignored the fact that the jury heard Rodriguez and Suarez testify, and the jury knew about and considered the victims' initial descriptions of the shooter's height and weight. Magistrate Peck ignored the fact that when Rodriguez and Suarez described the shooter, and when they identified Mr. Mendez, Rodriguez and Suarez were not friends, and could not have communicated, because they were in different hospitals. Magistrate Peck ignored the fact that the jury found, beyond a reasonable doubt, that Mr. Mendez was the shooter – thus, implicitly, finding Rodriguez and Suarez truthful and accurate in their identifications.

In stating that "the State's only evidence of Mendez's guilt was two eyewitnesses," Magistrate Peck also ignored the State's other evidence – such as Mr. Mendez's confession to Abreu; the bullet holes in Mr. Mendez's Toyota (seen by Abreu); and the evidence that Johnny Rodriguez and Mr. Mendez had had a previous armed encounter. Indeed, the only scenario under which Mr. Mendez could possibly be innocent would involve a conspiracy to lie among four people who were strangers to one another, had no common interest, and had no apparent motive to falsify. These people were Viterbo Abreu, Johnny Rodriguez, Nelson Suarez, and Detective Martinez.

Finally, Magistrate Peck ignored the physical and testimonial evidence that fatally undermined the theory that

four hit men were sent by Matos. The ballistics evidence showed that only one gun was used. The medical evidence confirmed the accounts of Johnny Rodriguez and Nelson Suarez, regarding how the shooting occurred – and also confirmed Mendez's confession to Abreu. Even Mr. Mendez's witness, Mr. Pacheco, and Mr. Guerra (who suddenly claimed that he knew that Mendez was not the killer) testified that one shooter was present. Indeed, Mr. Guerra confirmed the details testified to by Rodriguez and Suarez.

The State jury made the factual determination that Mr. Mendez was guilty of killing Albert Hayles and wounding Mr. Rodriguez and Mr. Suarez. The State trial judge, in deciding that Oswaldo's hearsay boasts had no exculpatory value under *Brady*, took the jury's factual determinations into account. The State trial judge, accordingly, wrote, "It is entirely possible that this lead is totally unrelated to the incident involving this defendant, or that this defendant was, in fact, carrying out the purported 'hit.'"

Subsection (e) of 28 U.S.C. § 2254 instructs that "a determination of a factual issue made by a State court shall be presumed to be correct" (emphasis supplied). As the foregoing demonstrates, the jury's verdict was not "an unreasonable determination of the facts in light of the evidence." Thus, 28 U.S.C. § 2254(d) was inapplicable. Nonetheless, Magistrate Peck single-handedly decided that the State court's factual determinations were incorrect, and that Mr. Mendez was innocent.

The Magistrate's *Brady* analysis was predicated on this legally improper, wholesale rejection of all of the State court's factual determinations. Magistrate Peck also decided, incorrectly, that unsubstantiated rumor had the status of *Brady* material. None of this Court's jurisprudence remotely supported the Magistrate's analysis.

Common sense also contradicted the Magistrate. Magistrate Peck stated that Oswaldo Rodriguez's reported boasts could have been used to impeach Johnny Rodriguez because Rodriguez could have been asked "whether he was pointing a finger at Mendez so that he would not get into further trouble with Oswaldo" (p. 48a). However, in his 90-page report, the Magistrate did not explain, or even try to explain, how Nelson Suarez (who identified Mr. Mendez as his shooter) or Viterbo Abreu (to whom Mr. Mendez confessed) would have been impeached by Oswaldo's reported statements. Nor did the Magistrate explain why, having been shot 18 times, and experiencing the accompanying fear and pain, Johnny Rodriguez would immediately accuse the supposedly innocent Mr. Mendez.

Magistrate Peck also wrote that Oswaldo Rodriguez's reported statements "would have cast doubt upon the shooter's identity" and that Oswaldo was "an alternative suspect"—even though under no scenario did Oswaldo Rodriguez shoot anyone. The Magistrate wrote that it was favorable evidence that "someone other than Mendez confessed to putting out a hit on Rodriguez"—even though under no scenario did Mr. Mendez "put out a hit" on anyone (pp. 48a, 51a). Magistrate Peck found it significant that the Virginia informants stated they did not know of Mr. Mendez (as though this ensured that Mr. Mendez was not a hit man hired by Matos).

The District Court's Decision

The District court adopted in toto Judge Peck's findings and recommendations, citing the Magistrate's "thorough and careful Report."

The Second Circuit Opinion

The Second Circuit affirmed "substantially for the reasons stated in the thorough and convincing opinion of Magistrate Judge Andrew J. Peck." The decision was split, with one judge voting to reverse. The case was argued on April 5, 2001. The court's decision was issued one year and four months later, on August 1, 2002.

Citing its own precedent, *Leka v. Portuondo*, 257 F.3d 89, 104 (2d Cir. 2001), the Second Circuit majority posed the question as "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial ... resulting in a verdict worthy of confidence" (p. 3a). The majority did not address whether or not the State court's decision was "an unreasonable application" of Supreme Court *Brady* jurisprudence, and instead relied, apparently, on the Magistrate's report, which had found the State decision an "unreasonable application."

The majority explicitly rejected the State's argument that, pursuant to 28 U.S.C. § 2254(e), the State court's factual and credibility determinations were presumptively correct. To the contrary, the majority wrote:

> If it is argued that the jury was not presented with a full picture of the facts because the state choose [sic] to ignore its disclosure obligations, the constitutional inquiry into the materiality of the suppressed information cannot be based on "deference" to a verdict reached without the benefit of that information. If that were the standard, no *Brady* claim could ever be deemed meritorious. (p. 11a, fn. 2).

According to the majority, Johnny Rodriguez's testimony about a previous shooting incident (which gave rise to Mr. Mendez's motive to kill him) was "weak," "unlikely," and "unconvincing," compared to the motive for murder portrayed in Oswaldo's hearsay boasts. The majority also found Johnny Rodriguez's testimony to contain contradictions regarding when he first learned Mr. Mendez's nickname ("Tony"). The majority found the guilty verdict against Mr. Mendez unworthy of confidence because "the idea that someone else wanted to kill Johnny Rodriguez ... for an entirely different motive than the one attributed to petitioner Hilden Mendez ... would have given Mendez the opportunity to establish reasonable doubt," and supplied "a possible alternative perpetrator *and* motive" (emphasis in original) (p. 4a).

However, the majority did not explain, specifically, how the possibility of a person with a motive to order a hit on Johnny Rodriguez benefitted Mr. Mendez. Moreover, the majority did not explain how Oswaldo's reported boasts undermined – or were even relevant to – the two victims' identifications of Mr. Mendez, Mr. Mendez's confession to Abreu, Mr. Mendez's independent motive for the shooting, the bullet holes in Mendez's car, or any of the other prosecution evidence.

The dissenting Second Circuit judge found that the State court's decision "was neither 'contrary to' nor 'involved an unreasonable application of' *Brady v. Maryland* and its progeny." She agreed with the State judge that Oswaldo's hearsay boasts were not exculpatory under *Brady*.

Moreover, the dissenting judge saw "no reasonable probability that the outcome of the trial would have been different" if the information about Oswaldo Rodriguez had been disclosed. She stated:

> The issue at trial was whether Mendez was the man who shot and killed Albert Hayles and shot and wounded Johnny Rodriguez. In my view, the undisclosed evidence went solely to the question of whether another person also wished to have Rodriguez killed. Given, *inter alia*, (a) eyewitness identifications of Mendez as the shooter, (b) a prior altercation involving Mendez and Rodriguez, and (c) the testimony of Mendez's friend that, two days after the shooting, Mendez said he had recently shot someone with whom he had had an altercation, I am not persuaded that a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) resulted from the prosecution's failure to disclose to Mendez that another person had hired someone–of unknown identity–to kill Rodriguez. (p. 12a)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In 1992, three men were shot on a Bronx street, one fatally. At the State murder trial, both survivors testified that the shooter was Hilden Mendez. Hilden Mendez was a stranger to one of the survivors, but the other survivor actually recognized Mendez from a previous encounter. The ensuing conviction was also supported by Mendez's confession of guilt to a friend and ballistics evidence.

Nonetheless, a federal magistrate recommended overturning the conviction, based on the fact that after Mendez's arrest, but before the trial, a New York detective learned from Virginia police officers that they had arrested two persons who claimed that they had heard that one Oswaldo Rodriguez, a drug-dealer, had "put out a hit" on one of the surviving witnesses, using four hit men. The essence of the

magistrate's decision were his determinations that (1) evidence that the drug-dealer had bragged about hiring four hit men was exculpatory under *Brady v. Maryland*; and (2) such evidence would have seriously undermined the State's case. The District Court judge adopted the magistrate's report *in toto*, and the Second Circuit affirmed for "substantially" the reasons given by the magistrate.

However, both the State trial judge and a Second Circuit judge found that Oswaldo's reported boasts were not exculpatory under *Brady*, and would not have affected the verdict.

Thus, this case provides this Court with an opportunity to re-visit the question that so closely divided the Court in *Kyles v. Whitley*, 514 U.S. 419 (1995). The prediction of the *Kyles* dissent has come true, and *Brady* has been used by at lease one circuit court to void a State criminal prosecution when the withheld material did not impeach any of the State's evidence – and, indeed, was not even admissible under applicable State rules of evidence.

This case also demonstrates that, after *Kyles*, more guidance as to what constitutes "*Brady* material" is needed, because at present the concept is so diluted as to be unworkable. After *Kyles*, there is no agreement or clarity about

> (1) whether unsubstantiated hearsay, which is completely contradicted by ballistics and eyewitness evidence, must nonetheless be viewed by prosecutors as "*Brady* material" that should and must be disclosed; and
> (2) whether hearsay that does not contradict any prosecution evidence, and does not point to any alternative suspect, can nonetheless be held to be "material" under *Brady*.

Nothing in the reported bragging of the drug-dealer, Oswaldo Rodriguez (hereinafter, the "Oswaldo hearsay"), detracted from the State's evidence. The Oswaldo hearsay did not impeach any witnesses or any physical evidence. Indeed, as to the boast about four gunmen, there was uncontested, overwhelming eyewitness testimony and uncontested overwhelming ballistics evidence proving that only one gunman was present and one gun was used. The jury's verdict spoke to its belief in the three civilian witnesses, and the trial judge – who presided over a post-trial *Brady* hearing – found that the Oswaldo hearsay "did not tend to exculpate defendant of the charges."

Second Circuit Judge Amalyea Kearse reviewed the record and found "abundant evidence that Mendez was the shooter and the undisclosed evidence did not suggest an alternate culprit but only an additional motive." Judge Kearse stated, "The fact that another person had a motive to kill Rodriguez could not undermine the evidence that Mendez too had such a motive, and it had no bearing on the eyewitness identifications of Mendez as the shooter" (dissent, p. 15a).

In addition to clarifying the concept of *Brady* material, this Court's intervention is needed to clarify three other issues.

First, the Second Circuit majority did not even pay lip service to the presumed correctness of State court factual determinations under 28 U.S.C. §2254(e). This is a serious departure from the mandate of the habeas corpus statute, and a serious violation of this Court's jurisprudence. *See Strickler v. Greene*, 527 U.S. 263, 290 (1999).

The Second Circuit majority even criticized the State for urging it to "defer to the jury's factual and credibility determinations." The Second Circuit majority stated that deference to State factual determinations was erroneous in the

context of *Brady*. The majority instructed that "[i]f it is argued that the jury was not presented with a full picture of the facts" – a predicate of all *Brady* claims – there should be no deference to any of the jury's factual determinations (p. 11a, fn. 2). This principle is logical only where suppressed information logically bears on a particular factual determination – e.g., where suppressed information would undermine the credibility or motives of a prosecution witness whom the jury believed. However, the Second Circuit enunciated this principle as having universal application, and applied it to Mr. Mendez's case – where the so-called suppressed information did not bear on the witnesses' credibility, nor undermine any of the jury's factual determinations.

The Second Circuit's error was apparently derived from misguided adherence to *Kyles v. Whitley*, 514 U.S. at 419. *Kyles* was a capital case decided in 1995 – i.e., before the passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Kyles* held that suppressed information was "material" under *Brady* because the information would have undermined specific prosecution evidence and pointed to a specific alternative suspect ("Beanie"). Justice Scalia, joined by three other dissenting justices, wrote, *inter alia*, that the *Kyles* majority engaged in improper factual finding, and, in the materiality analysis, failed "to consider the material under review as a whole," but only considered "isolated snippets," implicitly assuming that the jury would "punish sloppy investigative techniques by setting the defendant free." 514 U.S. at 459-64. Justice Scalia and the other dissenters feared that the *Kyles* majority opinion would be authority for the axiom that "'the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others.'" 514 U.S. at 469.

As Justice Scalia wrote,

> The weakening of one witness's testimony does not weaken the unconnected testimony of another witness; and to entertain the possibility that the jury will give it such an effect is incompatible with the whole idea of a materiality standard, which presumes that the incriminating evidence that would have been destroyed by proper disclosure can be logically separated from the incriminating evidence that would have remained unaffected. *Id.*

Justice Scalia's concern was, apparently, justified, for the Second Circuit decision in Mr. Mendez's case depends, in its entirety, on improper fact-finding at the federal level. The Second Circuit erred in stating that no deference to State factual findings was required and in holding that information that did not tend to impeach the State's case was material.

If this Court allows the Second Circuit's decision to stand, a host of State criminal convictions will, wrongfully, be overturned in this circuit. Whenever (1) there is a *Brady* claim in a habeas corpus case, and (2) two out of three federal judges, reading a cold record, decide that the prosecution evidence was "weak" or that a particular prosecution witness should not have been believed by the jury, there will be a reversal. The deference embodied in AEDPA and in this Court's habeas corpus jurisprudence will be cancelled out by the Second Circuit's decision that, in *Brady* cases, no deference to State factual determinations is due.

In Mr. Mendez's case, the "suppressed exculpatory evidence" was rumor and braggadocio, and suggested that someone other than Mendez also had a grudge against Johnny Rodriguez. However, no alternative shooter was suggested or described. The eyewitness identifications, confession, and ballistics evidence that the jury relied on were not impeached.

In many investigations, police and prosecutors turn up and sift through rumor and braggadocio. If disclosure of this material is required by *Brady*, *Brady* will be unworkable.

Never—not even in *Kyles*—has this Court reversed a State court conviction on *Brady* grounds on such facts. *See Strickler*, 527 U.S. at 290-96 (even though withheld evidence tended to discredit one eyewitness' truthfulness, this information did not put the other evidence of guilt, which was ample, in a different light); *Kyles* 514 U.S. at 510 (where defendant claimed that a prosecution informant was the murderer, and suppressed evidence would have "substantially reduced or destroyed" the credibility of some [though not all] of the prosecution witnesses, suppressed evidence was "material"); *United States v. Bagley*, 473 U.S. 667, 684 (1985) (impeachment evidence showing the "possibility of a reward" for the government witnesses "would be immaterial" unless it would have effected the verdict); *United States v. Agurs*, 427 U.S. 97, 114 (1976) (no reversal necessary where victim's criminal history was withheld, because the history "did not contradict any evidence offered by the prosecutor, and was largely cumulative"); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (where the indictment and conviction "depended almost entirely" on one witness, the prosecution's concealment of its promise to the witness that he would not be prosecuted if he cooperated was material, because anything affecting the witness' credibility was "important"); *Brady v. Maryland*, 373 U.S. at 88-90 (deferring to the State court's determination that suppressed confession of co-defendant was not material to the question of guilt, though it would be material to the question of punishment, since "nothing in [the confession] could have reduced the [defendant's] offense below murder in the first degree").

Mr. Mendez's case is governed by AEDPA, which affirmatively and explicitly mandates federal courts to presume that State court factual determinations are correct. The Second

Circuit majority apparently relied on the holding of *Kyles*, which was misleading on this point. Mr. Mendez's case presents an opportunity to clarify and correct the standard.

Second, the Second Circuit majority erred by adopting a wholly subjective standard for deciding whether suppressed information is "material." The majority wrote:

> [A]s we understand *Brady*, suppressed information need not wholly discredit the prosecution's theory of the case; it must only "put the whole case in such a different light as to undermine confidence in the verdict." (p. 6a, fn. 1, and see p. 3a)

(citing *Strickler v. Greene*, 527 U.S. 263, 290 [1990]). Although the majority cited *Strickler*, it did not correctly state the principle of law for which *Strickler* stands.

The Second Circuit majority expressly did not find that, had the Oswaldo hearsay been disclosed, there was "a reasonable probability of a different verdict." Rather, the majority stated, "the undisclosed evidence undermines our confidence in the jury verdict" (pp. 9a, 11a). The magistrate also adhered to this standard (p. 63a).

However, *Strickler* and this Court's other *Brady* jurisprudence make clear that there is only one standard to assess the materiality of suppressed evidence. That standard is objective, not subjective. As stated in *Strickler*, 527 U.S. at 289, the habeas corpus petitioner "must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." A "reasonable *possibility*" of a different outcome is insufficient. *Strickler*, 527 U.S. at 291 (emphasis supplied). Citing *Kyles v. Whitley*, 514 U.S. at 434, this Court

explained in *Strickler* that the question, alternatively stated, is whether the petitioner "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." This Court spoke of "a verdict worthy of confidence" to explain the materiality standard, not to offer an alternative, lesser, subjective standard of materiality. The Second Circuit, however, read this as an alternative standard (see p. 3a).

This Court should address and correct the misstatement and mis-interpretation of the Second Circuit, regarding the standard of materiality under *Brady*. The alternative is that—as in Mr. Mendez's case—at least in this circuit, criminal convictions will be overturned for trivial reasons.

Third, the Magistrate and Second Circuit majority ignored and disobeyed this Court's mandate in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1519-523 (2000). In *Williams v. Taylor*, this Court instructed federal courts in habeas corpus cases to review State court rulings to decide whether those rulings adhere to Supreme Court jurisprudence—not the jurisprudence of a particular circuit. This Court instructed federal courts to consider State court rulings in light of "the holdings, not the *dicta*," of Supreme Court cases. *Williams*, 120 S.Ct. at 1523.

Judge Kearse, the dissenting justice of the Second Circuit, found that the State court judge's decision was "neither 'contrary to' nor 'involved an unreasonable application of' *Brady v. Maryland* and its progeny" (p. 16a). Judge Kearse thus followed the law of this Court in two ways—she reviewed the State court decision, not the underlying facts; and she looked to Supreme Court jurisprudence, not the jurisprudence of the circuit. *See* 28 U.S.C. § 2254(d) and *Williams*, 120 S.Ct. at 1499, 1520-523.

The Magistrate and two Second Circuit majority judges did the opposite. They ignored the mandate of *Williams*. There was

not one federal authority on point—at any level—supporting their conclusion that unreliable hearsay regarding motive could be exculpatory and material under *Brady*. Not one of this Court's *Brady* decisions supported even remotely, or by extension, reversal in Mendez's case.

This Court should review this case to ensure that the Second Circuit complies with clear Congressional and Supreme Court mandates. Adherence to such mandates is particularly necessary in the area of habeas corpus litigation because comity is vital to the federal system.

To conclude, the Second Circuit majority mis-interpreted, mis-stated, and mis-extended important doctrines of federal law, in the areas of habeas corpus and *Brady*. In probable reliance on *Kyles v. Whitley*, 514 U.S. at 419, the majority ignored the plain meaning of 28 U.S.C. § 2254(e); ignored the mainstream *Brady* jurisprudence of this Court; and disobeyed *Williams v. Taylor*. This Court should clarify the law, give direction to State prosecutors and State courts, and correct the Second Circuit majority. If this Court fails to act, the effects will be widespread and harmful. There will be widespread lack of deference to State courts, and improper reversal of many State criminal convictions.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A—Opinion of United States Court of Appeals for the Second Circuit Entered August 1, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2000

(Argued: April 5, 2001 Decided: August 1, 2002)
Docket No. 00-2548

HILDEN MENDEZ,

Pedtitioner-Appellee,

-v.-

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellant.

Before: KEARSE, CABRANES and KATZMANN, *Circuit Judges.*

Appeal from a decision of the United States District Court for the Southern District of New York (McKenna, *Judge*), adopting in full the June 6, 2000 Report and Recommendation of United States Magistrate Judge Peck and granting in part a petition for a writ of habeas corpus. The respondent appeals, contending that the district court erred in granting the habeas petition on the ground that *Brady v. Maryland* was violated by the prosecution's withholding of exculpatory documents. Affirmed.

Judge Kearse dissents in a separate opinion.

KERRY ELGARTEN, The Legal Aid Society, Criminal Appeals Bureau, New York, NY, *for Appellee.*

ELIZABETH F. BERNHARDT, Assistant District Attorney, Bronx, NY (Robert T. Johnson, District Attorney Bronx County, Joseph N. Ferdenzi, Assistant District Attorney, *on the brief*), *for Appellant.*

PER CURIAM:

Respondent Christopher Artuz appeals from a judgment of the United States District Court for the Southern District of New York (Lawrence M. McKenna, *Judge*), granting a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to petitioner Hilden Mendez on the ground that his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated. Mendez had been convicted by a jury of, *inter alia*, the attempted murder of Johnny Rodriguez and the murder of a second individual. The District Court, in granting the writ of habeas corpus, found that New York State authorities had failed to disclose material evidence favorable to Mendez—that another individual had placed a contract on the life of Johnny Rodriguez prior to the shooting—and that this failure undermined confidence in the outcome of the trial.

We affirm the decision below substantially for the reasons stated in the thorough and convincing opinion of Magistrate Judge Andrew J. Peck, *see Mendez v. Artuz*, No. 98 Civ. 2652, 2000 WL 722613 (S.D.N.Y. June 6, 2000), adopted *in toto* by the District Court, *see Mendez v. Artuz*, No. 98 Civ. 2652, 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000). We assume familiarity with the facts and the procedural history outlined by Magistrate Judge Peck and write only to emphasize a few pertinent aspects of the state court record.

DISCUSSION

The standard for federal habeas review of a claim arising under *Brady v. Maryland*, 373 U.S. 83 (1963), is fully set forth in the decision below. *See Mendez*, 2000 WL 722613, at *11-13. We recently restated that standard: "In the context of *Brady*, a defendant is deprived of a fair trial only where there is a reasonable probability that the government's suppression affected the outcome of the case, or where the suppressed evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *In re United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)) (internal citation omitted); *see also Leka v. Portuondo*, 257 F.3d 89, 104 (2d Cir. 2001) (stating that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial...resulting in a verdict worthy of confidence.") (internal quotation marks and citations omitted). The undisclosed evidence "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976); *see also U.S. v. Vozzella*, 124 F.3d 389, 392 (2d Cir. 1997).

The suppressed evidence in question in this case included information that another person, Oswaldo Rodriguez (no relation to Johnny Rodriguez), held by police authorities in Virginia, had admitted to placing a contract on Johnny Rodriguez's life prior to the shooting because he believed that Johnny Rodriguez had stolen $100,000 from him. *Mendez*, 2000 WL 722613, at *9. We agree with the District Court that in the context of the entire record presented here, "[a]dvancing the idea that someone else wanted to kill Johnny Rodriguez... for an entirely different motive than the one attributed to petitioner Hilden Mendez (also known as *Tony* Mendez) as advanced by the prosecution at trial would have given Mendez the opportunity to establish reasonable doubt in the jury's mind

as to who shot Johnny Rodriguez." *Id.* at *13. The suppressed information would have allowed Mendez to challenge the state's motive theory as advanced by Johnny Rodriguez and Victor Abreu, who had been with Mendez at the time that Mendez was arrested, either through cross-examination or the presentation of contradictory testimony. This would have provided a significant boost to the defense because the prosecution's motive theory—that Mendez had a motive to shoot Johnny Rodriguez because Johnny Rodriguez had been present at an earlier encounter when a friend of Johnny Rodriguez's shot at Mendez—together with the weak and contradictory eyewitness testimony at the shooting was not compelling. The suppressed information would have allowed Mendez to develop the alternative theory that Oswaldo Rodriguez sought to have Johnny Rodriguez killed because he thought that Johnny Rodriguez had stolen $100,000 from him.

While the dissent correctly notes that "[m]any persons may have had motives to kill Johnny Rodriguez, but there was only one shooter," we disagree with its interpretation that the previously undisclosed evidence "did not suggest an alternative culprit but only an additional motive"—thus not tending to exculpate Mendez. The previously undisclosed evidence does suggest a possible "alternative culprit"—that the shooter was the contract killer commissioned by Oswaldo Rodriguez. That the shooter passed the group of men without incident or altercation and then turned and opened fire with a machine gun also could be consistent with the theory that this shooting was a hired "hit" and not a personal vendetta. The undisclosed evidence also goes to motive. Johnny Rodriguez's alleged theft of $100,000 from Oswaldo Rodriguez explains why Oswaldo Rodriguez credibly might have wanted Johnny Rodriguez killed. Inasmuch as this evidence supplies a possible alternative perpetrator *and* motive, we cannot conclude that its exclusion from Mendez's trial did not prevent the jury from weighing differently all of the facts before it.

In contrast, the state asserted a weak and unlikely theory that Mendez's motive to shoot Johnny Rodriguez arose out of an altercation that Mendez had with an unnamed friend of Johnny Rodriguez while Johnny Rodriguez was present. Johnny Rodriguez testified that he and the fried were in Johnny Rodriguez's car when the friend got into a dispute with Mendez, got out of the car, and shot at Mendez, hitting Mendez's car twice. (Trial Transcript at 95) ("Tr."). While the friend argued with and shot at Mendez, Johnny Rodriguez pulled "ahead" and "parked" (Tr. 95), and thus was not directly involved in the dispute. The prosecutor argued that Mendez wanted to kill Johnny Rodriguez "because of that shooting incident.... I submit to you that this is [the] motive for all of this." (Tr. 487) But it is not at all clear from Johnny Rodriguez's testimony that Mendez even saw him at the scene of the shooting or associated him with the shooter. We are thus left with a rather strained and speculative prosecution motive theory: that Tony would seek to murder Johnny Rodriguez—but apparently not the unnamed person who actually shot at him—in front of multiple witnesses because Johnny Rodriguez was earlier with the shooter but then was "parked ahead" in his car while the shooter attacked Mendez. Suppressed information is exculpatory and thus "favorable" to the defense for *Brady* purposes when it directly contradicts the motive theory testified to by prosecution witnesses. *See United States v. Zuno-Arce*, 44 F.3d 1420, 1426 (9th Cir. 1995); *cf. Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. 1986). *A fortiori*, this must be particularly true when the prosecution's motive theory is weak or unconvincing.

The state argues that the suppressed information was not favorable to the defense because it did not suggest an alternative shooter but only an additional motive for the shooting. It is true that the suppressed information did not name any contract killers hired by Alfredo Matos on behalf of Oswaldo Rodriguez. However, Alfredo Matos did not indicate

in the suppressed DEA report that he knew Mendez. *Mendez*, 2000 WL 722613, at *8. Furthermore, the state did not present evidence connecting Mendez and Oswaldo Rodriguez. *Id.* at *13. In fact, Francis Paulino, who witnessed the theft of Oswaldo Rodriguez's $100,000, Romulo DeLeon, to whom Oswaldo Rodriguez stated that he had placed a contract on Johnny Rodriguez, and Oswaldo Rodriguez himself, all stated that they did not know Mendez. *Id.* at *6-7, *10, *13 (citing testimony at § 440.10 hearing). In addition, included among the suppressed documents was a report that members of the "Machederos" gang had been hired to do the shooting, *see id.* However, there was no evidence that Mendez was a member of this gang. The suppressed information suggesting that more than one individual was hired to kill Johnny Rodriguez could have been corroborated by Johnny Rodriguez's trial testimony that he thought he saw a second armed gunman during the shooting. (Tr. 160-61) Presenting testimony to this effect, or asking questions about this on cross-examination, would have allowed the defendant to create reasonable doubt that he was the shooter. We believe that he should have been given that opportunity.[1]

We do not agree with the state that the suppressed information was not material. In particular, the respondent-appellant stresses Johnny Rodriguez's identification of Mendez as the shooter, stating that Johnny Rodriguez accused Mendez immediately at the scene of the shooting and also later at the

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[1] It may be that the existence of another person who had a motive to kill Johnny Rodriguez would not undermine a jury's determination that Mendez, too, had a motive. But as we understand *Brady*, the suppressed information need not wholly discredit the prosecution's theory of the case; it must only "put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. 263, 290 (1999). In that circumstance, the jury would be allowed to choose between the two competing theories of the case.

hospital—supporting the jury's conclusion that Mendez was the shooter.

However, other trial evidence showed that the identification testimony of Johnny Rodriguez was contradictory. Johnny Rodriguez first testified that he had "seen him [Mendez] about in the area" before the shooting. (Tr. 90) When asked whether "[b]efore August 3, 1990, the night of the shooting, did you know him by any name," Johnny Rodriguez responded "No." (Tr. 91) The prosecutor asked whether he later learned the defendant's name, and Johnny Rodriguez said "Yes" without further elaboration. (Tr. 91)

Later, the prosecutor asked, "When did you find out that [Mendez's nickname or alias] was Tony? Before the night of the incident?" Johnny Rodriguez replied "I've heard of him [Mendez], his name as Tony before, from that day of the dispute." (Tr. 113-14) The prosecutor followed up asking "[f]rom the day of the dispute you learned his [Mendez's] name was Tony?" And Johnny Rodriguez answered "[r]ight." (Tr. 114) From the context of the preceding questions, it is clear that the "dispute" that Johnny Rodriguez was referring to was the incident two weeks prior to August 3 that allegedly had provided the defendant's motive for the crime. Johnny Rodriguez therefore directly contradicted his earlier testimony that he only learned that the shooter was known as Tony after the August 3 shooting.

Johnny Rodriguez then gave a further description of his alleged on-scene identification of the defendant on August 3. He testified that while lying on the ground (Tr. 114), a blue-uniformed police officer spoke to him (Tr. 125), and "asked me if I seen who did it. And I said yes. I said Tony did it." (Tr. 114) The prosecution offered no corroboration for this. Officer Aponte testified that he was at the scene of the shooting on August 3 and spoke to Johnny Rodriguez, but stated that

Johnny Rodriguez did not identify or describe the shooter. (Tr. 366) No other police officer who had been at the scene of the shooting testified at trial. The testimony about the later identification by Johnny Rodriguez at the hospital also raises questions. Detective Vickery testified that he and his partner interviewed Johnny Rodriguez at the hospital after the August 3 shooting and that Johnny Rodriguez never mentioned the name Tony, but only gave a description of the shooter. (Tr. 376) Detective Martinez interviewed Johnny Rodriguez for the first time in the hospital on August 3. (Tr. 339) In his trial testimony, Detective Martinez responded "yes" to the following question of the prosecutor. "And after the [hospital] conversation with Johnny Rodriguez, did there come a time when you heard the name of the person who did the shooting?" (Tr. 339) However, it was never clarified whether the detective learned this from Johnny Rodriguez at the hospital or some time afterwards, and the formulation of the prosecutor's question seems to imply that Detective Rodriguez learned of the shooter's alleged name only after meeting with Johnny Rodriguez at the hospital. Thus, no witness corroborated Johnny Rodriguez's claim that he identified the shooter as Tony at the scene of the shooting; he himself had testified earlier that he only learned that the shooter was named Tony after the August 3 shooting, and no clear testimony was presented about when, if ever, Johnny Rodriguez identified the shooter as Tony during later interviews at the hospital.

The contradictory eyewitness testimony about the shooter's height and weight also gives us pause. Detective Vickery testified that at the hospital Johnny Rodriguez described the unnamed shooter as 5'4" tall, weighing 130 pounds. (Tr. 375) At the hospital Nelson Suarez, an eyewitness and victim, described the shooter to Detective Martinez as 5'2" to 5'8", weighing 130 pounds. (Tr. 314-16, 329-30) By contrast, at Mendez's arrest and booking, Detective Martinez noted that he was 6'2" and weighed 190 pounds. (Tr. 351-52) Mendez

weighed nearly *fifty percent more* and was approximately between *six to twelve inches taller* that what the eyewitness testified. These discrepancies are significant and troubling. The shooting took place on the street in the middle of the night. The shooter was wearing a baseball cap. (Tr. 116, 315, 375) Thus, the shooter's face was likely at least partially obscured by shadows. It should also be noted that two eyewitnesses to the shooting testified at trial that they saw the shooter and that it was not Mendez. (Tr. 260, 398) One of these witnesses, who was related by marriage to Johnny Rodriguez and had worked with him for years—suggesting that he likely had no motive to testify falsely in a way that would discredit Johnny Rodriguez—also corroborated the contemporaneous height and weight descriptions of the shooter given by the other eyewitnesses. (Tr. 398) (estimating that the shooter was 5'3" and weighed approximately 132 pounds). Evidence pointing to another motive for the shooting and the lack of connection between Mendez and Oswaldo Rodriguez and Alfredo Matos would have allowed the defendant to further emphasize the serious inconsistencies and flaws in the state's identification of him. In these circumstances, the undisclosed evidence undermines our confidence in the outcome of the trial.

The defendant could also have used the suppressed information to challenge the thoroughness and adequacy of the police investigation. *See Kyles*, 514 U.S. at 446 n.15 (stating that "indications of conscientious police work will enhance probative force and slovenly work will diminish it"). Presented with detailed information about a contract murder plot and no indication that Mendez was involved or even associated with the participants, the police essentially did nothing.

> Detective Martinez testified at the § 440.10 hearing that his investigation into the information about Oswaldo consisted only of checking to see if Oswaldo, a drug dealer,

> reported to his local police precinct that someone stole $100,000 in cash he had stashed in his mother's house. Since that theft was not reported, Detective Martinez determined that "[i]t didn't have anything to do with the homicide." Detective Martinez never contacted any of the witnesses who told the Virginia detectives about the hit.

Mendez, 2000 WL 722613, at *19. This response was, to say the least, inadequate. Prosecutors often argue, and courts agree, that "a large quantity of cash" is one of the "indicia of a drug dealer." *E.g., United States v. Lovelace*, 123 F.3d 650, 652 (7th Cir. 1997); *Wright v. United States*, 113 F.3d 133, 135 (8th Cir. 1997); *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 403 (2d Cir.), *cert. denied*, 508 U.S. 913 (1993); *United States v. Morris*, 977 F.2d 617, 622 (D.C. Cir. 1992). It is difficult to understand why Detective Martinez did not realize that someone holding $100,000 in cash may well be involved in drug trafficking or other illegal activity and therefore be reluctant to admit this to the police, much less to request police involvement in tracking down the missing funds. The absence of any credible investigation could have allowed Mendez to present a strong challenge to the thoroughness and reliability of the police work.

CONCLUSION

The suppressed information, which strikes at the central weaknesses in the prosecution's physical identification of Mendez and proffered motive for the shooting, undermines our confidence in the jury verdict.[2] In light of the substantial length of time Mendez already has been incarcerated, the District Court shall issue a writ of *habeas corpus* to Mendez on the sixtieth calendar day after the issuance of our mandate unless the District Attorney of Bronx County has, by that point, taken concrete and substantial steps expeditiously to retry him. We affirm the denial of the petitioner's *Wade* claim for the reasons stated by the magistrate judge.

Affirmed.

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[2] We pause to note that the prosecution did not correctly set forth the nature of the *Brady* inquiry in its briefs to this Court. *See, e.g.*, Gov't Brief at 4 (arguing that a federal habeas court hearing a *Brady* claim must "defer to the jury's factual and credibility determinations"); *id.* at 18 ("The law requires deference to a jury's credibility findings."); *id.* at 34 (criticizing the district court for "disregard[ing] the jury's credibility findings"); Gov't Reply Brief at 12 ("[I]n considering these issues, this Court should defer to the jury, who heard, saw and evaluated the victims, and believed their identifications."). If it is argued that the jury was not presented with a full picture of the facts because the state choose to ignore its disclosure obligations, the constitutional inquiry into the materiality of the suppressed information cannot be based on "deference" to a verdict reached without the benefit of that information. If that were the standard, no *Brady* claim could ever be deemed meritorious.

KEARSE, Circuit Judge, dissenting:

I respectfully dissent from the view that habeas corpus was properly granted overturning the state-court conviction of petitioner Hilden Mendez. The issue at trial was whether Mendez was the man who shot and killed Albert Hayles and shot and wounded Johnny Rodriguez. In my view, the undisclosed evidence went solely to the question of whether another person also wished to have Rodriguez killed. Given, inter alia, (a) eyewitness identifications of Mendez as the shooter, (b) a prior altercation involving Mendez and Rodriguez, and (c) the testimony of Mendez's friend that, two days after the shooting, Mendez said he had recently shot someone with whom he had had an altercation, I am not persuaded that a violation of Brady v. Maryland, 373 U.S. 83 (1963), resulted from the prosecution's failure to disclose to Mendez that another person had hired someone–of unknown identity–to kill Rodriguez.

The evidence included the following. Shortly after 1 a.m. on August 3, 1990, Rodriguez, his cousin-in-law David Pacheco, and Nelson Suarez were talking on a sidewalk in the Bronx, New York, waiting for Gustavo Guerra, a mechanic who repaired cars on the street, to finish repairing Rodriguez's car. Also present was Hayles, who was waiting for his own car to be repaired. A man approached and said something innocuous; he then walked a few steps away, turned around, pulled a machine gun from his waist, and, looking at Rodriguez, began to shoot.

The men promptly ran for cover. Pacheco and Guerra escaped uninjured. Suarez was shot once in the leg and survived. Hayles was shot twice and died. Rodriguez was shot in the arms and legs a total of 18 times but survived.

When the police arrived at the scene, they asked Rodriguez whether he had seen the shooter. Rodriguez testified that he responded that he had seen the shooter and that the shooter, whom he had previously seen in the neighborhood, was "Tony." No one else at the scene told the police that the shooter was known to them or looked familiar.

On August 6, the police received information that the person or persons they were looking for in connection with the shooting were in a jeep at a certain location. The police went there and found Mendez and Viterbo Abreu in a jeep. They arrested Mendez on murder charges; he admitted to using the name "Tony." On the following day, Mendez was placed in a lineup. Suarez was the only witness who viewed the lineup; he identified Mendez as the August 3 shooter.

Both Rodriguez and Suarez also identified Mendez as the shooter at trial. Shortly after the shooting, Rodriguez and Suarez had described the shooter as shorter and slighter (5'2" to 5'9" tall, 130 to 160 pounds) than Mendez's actual size (6'2" tall, 190 pounds); and they stated at trial that Mendez had looked somewhat slimmer at the time of the shooting than he did at trial. But both witnesses expressed certainty that Mendez was the shooter. Suarez, for example, testified that although he recalled the shooter as being shorter and thinner, the face was the same, it was Mendez's face he recognized, and he had no doubt that Mendez was the shooter.

Rodriguez testified that he recognized Mendez at the August 3 shooting from an incident that had occurred some two-to-four weeks earlier. In that earlier encounter, Rodriguez and a companion had been in Rodriguez's car when the companion got into a violent argument with Mendez. The companion left Rodriguez's car and fired shots at Mendez. It was on that day that Rodriguez learned that Mendez was called "Tony."

Abreu, who was with Mendez when the police found him on August 6 and was arrested on an unrelated weapons charge, also testified for the prosecution. Abreu had known Mendez for five years and had always known him by the name "Tony." Abreu testified that on August 5, Mendez was driving a Toyota Prelude automobile with two bullet holes in it, and that Mendez said he had been shot at and had retaliated by shooting two or three people he held responsible for shooting at him. These statements by Mendez provided corroboration both for Rodriguez's account of his prior encounter with Mendez and for Rodriguez's recognition of Mendez as the August 3 shooter.

The evidence that was not disclosed by the prosecution, and that has occasioned the granting of habeas overturning Mendez's conviction, was that one Oswaldo D. Rodriguez ("Oswaldo") (apparently not related to Johnny Rodriguez) had commissioned the killing of Johnny Rodriguez as revenge for a theft of money belonging to Oswaldo. In the context of the present case, I have difficulty seeing that this evidence was material, i.e., that if it had been disclosed there was a reasonable probability that the outcome of the trial would have been different.

Many persons may have had motives to kill Johnny Rodriguez, but there was only one shooter. Johnny Rodriguez, at the scene of the shooting, identified Mendez by nickname; Suarez identified Mendez in a lineup four days after the shooting; and both Rodriguez and Suarez identified Mendez at trial. The fact that another person too had a motive and may have commissioned a killing does not affect the positive identification testimony.

To be sure, not all of those present at the shooting identified Mendez as the shooter. Guerra and Pacheco testified that the shooter was not Mendez; but there was ample basis for the jury

to discredit that testimony as having been recently fabricated. Guerra, for example, testified at trial that he had gotten a good look at the shooter; but he admitted that he did not see the shooter at first because his head was under the hood of Rodriguez's car when the shooter approached, and that when the shooting started he ran. And although Guerra testified that he looked at the shooter from between cars, he had told a police officer that he was not present at the August 3 shooting and had seen nothing. Pacheco too testified at trial that he had gotten a good look at the shooter; and he testified that he recognized the shooter as someone he knew as "Ray." But Pacheco, when questioned by the police, had not said he recognized the shooter.

The evidence that Oswaldo had commissioned a killing did nothing to support the testimony of these two witnesses. There was no indication that the man whom Oswaldo had hired was named Ray; no name was provided for the hit man. Indeed, the Oswaldo evidence may have provided another indicium that the shooter was Mendez: Abreu testified that Mendez drove a Toyota, and the person who informed the police about Oswaldo stated that Oswaldo's hit man had driven a Toyota.

In sum, there was abundant evidence that Mendez was the shooter, and the undisclosed evidence did not suggest an alternative culprit but only an additional motive. The fact that another person had a motive to kill Rodriguez could not undermine the evidence that Mendez too had such a motive, and it had no bearing on the eyewitness identifications of Mendez as the shooter. The state court, after holding a lengthy hearing into Mendez's Brady challenge, concluded that the undisclosed information neither was favorable to Mendez in any material way nor tended to exculpate him. In my view, that conclusion was neither "contrary to" nor "involved an unreasonable application of" Brady v. Maryland and its progeny, 28 U.S.C. § 2254, for even if the information had been

disclosed, I see no reasonable probability that the outcome of the trial would have been different. I would thus reverse the granting of the writ.

Appendix B—Memorandum and Order of United States District Court, Southern District of New York, Entered August 14, 2000 and Judgment Entered August 22, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HILDEN MENDEZ, :

Petitioner, : 98 Civ. 2652 (LMM)

- against - :

CHRISTOPHER ARTUZ, : MEMORANDUM AND ORDER

Respondent, :

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McKENNA, D.J.

By Report and Recommendation dated June 6, 2000 (the "Report"), Magistrate Judge Peck recommended that this petition for a writ of habeas corpus be granted on the ground that the prosecution failed to disclose to defendant evidence required to be disclosed under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Judge Peck recommended that the petition be denied as to the other grounds asserted by petitioner.

Both petitioner and respondent have filed objections to the Report. The Court has made a de novo determination of those portions of the report and specific proposed findings and recommendations to which objection has been made, and accepts Judge Peck's findings and recommendations in whole, for the reasons set forth in his thorough and careful Report.

Accordingly, the petition is granted in part to the extent and for the reasons set forth in the Report, and denied in part to the extent and for the reasons set forth in the report.

Petitioner is to be released unless, within 120 days of the date of this Memorandum and Order, petitioner is given a new trial.[1]

SO ORDERED.

Dated: August 11, 2000

s/ Lawrence M. McKenna
Lawrence M. McKenna
U.S.D.J.

---

[1] All issues in this matter having been resolved by this Memorandum and Order, the Clerk is directed to close this case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

HILDEN MENDEZ,

Petitioner,

-against-

98 CIVIL 2652
(LMM)

CHRISTOPHER ARTUZ,

Respondent.

JUDGMENT

----------X

Whereas the Honorable Andrew J. Peck, United States Magistrate Judge, having issued a Report and Recommendation (the "report") dated June 6, 2000, recommending that the petition be granted on the ground that the prosecution failed to disclose to defendant evidence required to be disclosed and denying the petition as to the other grounds asserted and the matter having come before the Honorable Lawrence M. McKenna, United States District Judge, and the Court, thereafter, on August 11, 2000, having rendered its Memorandum and Order adopting the report, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated August 11, 2000, the report is hereby adopted; accordingly, the petition is granted in part to the extent and for the reasons set forth in the report, and denied in part to the extent and for the reasons set forth in the report; the Court directs that the petitioner is to be released unless, within 120 days of the date of the Memorandum and Order dated August 11, 2000, petitioner is given a new trial.

DATED: New York, New York
August 22, 2000

JAMES M. PARKISON

Clerk of Court

BY:

s/(illegible)

Deputy Clerk

THIS DOCUMENT WAS ENTERED
On the docket on 8/22/00

U.S. DISTRICT COURT
FILED
AUG 22 2000
S. D. OF N. Y.

Appendix C—Report and Recommendation of United States Magistrate Judge Andrew J. Peck

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HILDEN MENDEZ,

Petitioner,

- against -

CHRISTOPHER ARTUZ, Superintendent, Green Haven Correctional Facility, et al.,

Respondents,

98 Civ. 2652 (LMM)(AJP)

REPORT AND RECOMMENDATION

----------x

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Lawrence M. McKenna, United States District Judge:

Petitioner Hilden Mendez was convicted of the shooting murder of Albert Hayles and the attempted murder of Johnny Rodriguez and Nelson Suarez. (See Pet. ¶ 4.) Mendez's present § 2254 habeas petition, filed on his behalf by the Legal Aid Society, argues that: (1) the prosecutor violated Mendez's due process rights by failing to disclose Brady evidence that a third party put out a hit (murder contract) on Johnny Rodriguez prior to the shooting (Pet. ¶ 12(A); Mendez Br. at 37-48); (2) the photo array and lineup were impermissibly suggestive (Pet. ¶ 12(B); Mendez Br. at 49-52); and (3) the trial court admitted inadmissible hearsay at trial and impermissibly curtailed the cross-examination of a witness (Pet. ¶ 12(C); Mendez Br. at 57-64).

For the reasons set forth below, because the prosecution failed to disclose materially exculpatory evidence that a third party put out a hit on Johnny Rodriguez as required by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), and its progeny, I recommend that Mendez's petition be granted. Mendez's second habeas ground is procedurally barred and his third habeas ground is meritless.

FACTS

The Trial Evidence

On August 3, 1990, at 1:10 a.m., Johnny Rodriguez was standing on the sidewalk at 65-67 East 175th Street in the Bronx talking with Nelson Suarez, while waiting for mechanic Gustavo Guerra to fix his black Mercedes Benz. (Trial Transcript ["Tr."] 80-82, 113, 142-43, 252-53, 296-97, 304.) Also present were David Pacheco, Rodriguez's cousin's husband, and Albert Hayles, who was waiting for his Porsche to be fixed. (Tr. 82, 143-45, 252-53, 297, 384-85.) While Guerra's head was under the Mercedes's hood, a man walked across the street and asked if the cars were fixed, or said something like "how are you doing." (Tr. 80-84, 157-58, 253-55, 296-300, 303.) The man then took a few steps, turned around, pulled a large black machine gun from his waist, and, looking at Rodriguez, began to shoot. (Tr. 83-86, 258, 296, 300.)

Suarez stared directly at the shooter, whom he had never seen before, and ran when he saw the gun, but was shot in the right leg. (Tr. 296-98, 300-01, 305-06, 332.) Rodriguez, who also had an unobstructed view of the shooter whom he had seen before in the neighborhood, ran between some cars, felt shots in his arms and legs, and dove under a car. (Tr. 87-91, 150.) Rodriguez was shot three times in the arm, seven times in the right leg and eight times in the left leg. (Tr. 117.) When the

police arrived, Rodriguez told them that "Tony" shot him.[1] (Tr. 114, 125, 157, 339.) Rodriguez and Suarez were taken to the hospital. (Tr. 89, 117-18, 301, 303, 312.) Hayles died from his gunshot wounds. (Tr. 50-51.)

Rodriguez testified that at the hospital emergency room, he gave the police a description of the shooter as slim, about 5'7" or 5'8", wearing jeans, a yellow tank top and a cap. (Tr. 115-17, 149.) He also testified that in the emergency room he described the shooter to detectives as "a male Hispanic, 28," "kind of dark skin[ned]," between 5'5" and 5'9", between 130 and 160 pounds. (Tr. 148-49.) Detective Dennis Vickery, who interviewed Rodriguez at the hospital, testified that Rodriguez described the shooter as "a male Hispanic, about 28 years old, . . . approximately five feet four, 130 pounds, and wearing a yellow tank top, . . . a baseball hat and jeans." (Tr. 374-77.) Rodriguez also thought he saw a second man he did not know with a gun. (Tr. 160-61, 168-69.)

At the hospital, Suarez described the shooter to Detective William Martinez as a male Hispanic, 5'2" to 5'8", 130 pounds, medium complexion with a mustache, wearing a green cap, green t-shirt and blue jeans. (Tr. 314-16, 329-30.)

On August 6,1990, the police received information that suspects in the shooting were in a jeep at 175th Street and Weeks Avenue. (Tr. 231-33.) The police found Mendez with Victor Abreu in the jeep and arrested Mendez for the murder and Abreu on an unrelated weapons charge. (Tr. 178-79, 233-34, 342-43.) After the arrest, Mendez told Detective Martinez that

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[1] Rodriguez testified that he did not know the shooter's name, but later learned his name was "Tony." (Tr. 91.) He also contradictorily testified that he had learned Tony's name before Rodriguez was shot. (Tr. 114.)

he also went by the name "Tony." (Tr. 343.) Detective Martinez noted that Mendez was 6'2" and 190 pounds. (Tr. 351-52.)

Detective Martinez told Abreu that if he helped out on the shooting case, Detective Martinez would ask the Assistant District Attorney to help Abreu on the weapons charge. (Tr. 345.) In return, Abreu told Detective Martinez that on August 5, 1990, Mendez came over to Abreu in a Toyota Prelude that had two bullet holes in it. (Tr. 183-199.) According to Abreu, Mendez said that "they had tried to kill him, that he went back to the house and went back to get the people," and that he shot two or three people that were there. (Tr. 183-84, 197-99, 344.)

Johnny Rodriguez testified that two to four weeks before the shooting he had been in a car with another person from the neighborhood when the other person and "Tony" got into an argument, and the other person got out of Rodriguez's car and shot at Tony's car. (Tr. 95-97, 113.) The prosecution's theory at trial was that Tony Mendez had tried to kill Rodriguez because Rodriguez had been with the man who had shot at Mendez's car. (E.g., Tr. 487.)

On August 7, 1990, Suarez identified Mendez in a lineup as the shooter. (Tr. 306-10.) At trial, Suarez said that the shooter was shorter and thinner than Mendez, but his face was the same, and that Mendez definitely was the shooter. (Tr. 315, 320-21, 324-26, 333-34.) Rodriguez also identified Mendez as the shooter at trial (Tr. 81-82, 92), but said that the shooter was about 5'8" and looked a little slimmer than Mendez. (Tr. 150-51.) Guerra, who hid behind a car during the shooting, testified that he had gotten a good look at the shooter and would recognize the shooter if he saw him again, but that Mendez was not the shooter. (Tr. 259-60.) Pacheco also got a good look at the shooter and testified that Mendez was not the shooter. Tr. 398.) Pacheco testified that the shooter was his

friend "Ray," whom he described as a dark skinned Hispanic man about 5'3", 132 pounds.[2] (Tr. 397-98, 408-09, 415,418.)

No fingerprint, ballistic, or other physical evidence tied Mendez to the crime.

Abreu's Testimony

Abreu testified that after he was arrested, he spoke with Detective Martinez, who promised Abreu he would drop the weapons possession charges if Abreu told him what Mendez had said about the shooting. (Tr. 181-82, 192.) Abreu told Detective Martinez what he knew because he thought Detective Martinez would drop the charges, but he never did. (Tr. 181-83, 192.)

Abreu testified that the weapons possession charges brought against him in connection with his and Mendez's arrest were pending before the judge who was presiding over Mendez's trial. (Tr. 176.) Although neither the prosecutor nor the judge had made him any promises with respect to his testimony against Mendez, Abreu felt it could have some bearing on the sentence he would receive in his weapons possession case. (Tr. 176-79, 185-86.)

On cross-examination, defense counsel asked Abreu repeatedly about what sort of treatment he expected when he made his statement to Detective Martinez:

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[2] Pacheco was in the courthouse pens with an inmate named David, who told Pacheco about the incident and said he thought the wrong man had been arrested. (Tr. 402-04, 409-10.) Pacheco, who did not know Mendez, said that he knew what had happened and who the shooter was and would testify for Mendez. (Tr. 402-03, 405.)

> Q I'm asking about your state of mind. When you made the statement that you made, did you think that Detective Martinez would dismiss the new gun charge against you in return for your making that statement?
> A Well, it was under that promise that I said that.
> Q So when you made the statement it wasn't to be a good citizen or to reveal to the law enforcement authorities a bad thing that you knew about as a good citizen but was done to help yourself to get rid of the new gun case; is that what it was?

(Tr. 193.) The prosecutor's objection to this question, and similar questions, was sustained. (Tr. 193-95, 197, 204-11; see pages 70-71 below.) Indeed, the trial judge told the jury that no promises had been made to Abreu. (Tr. 204, 209-10, quoted at page 73 below.)

Defense counsel moved for a mistrial based upon

> the defense['s] belief that the Court made itself a witness when it told the jury directly during the course of [defense counsel's] cross-examination that no promises have been made to. . . Abreu, and no deals have been made, and that the Court making itself an unsworn witness took the issue away from the jury. Besides the fact that [defense counsel's) cross-examination was thwarted in going to Mr. Abreu's state of mind as to whether he thought that he would derive a benefit from testifying at this trial.
>
> The Court's assertion to the jury took away the issue from the jury's consideration as to what Mr. Abreu's state of mind is and what Mr.

> Abreu's cooperation would bring to him in Mr. Abreu's mind.

(Tr. 220-21.) The trial judge denied the mistrial motion, because:

> The Court met with the Assistant District Attorney, Miss Sharpe, met with [defense counsel], and met with Mr. Muraskin [Abreu's attomey) in chambers and . . . the Court did its best in seeking to assure the defense counsel representing the defendant Mr. Hilden Mendez that, in fact, this Court had never entered into any arrangement, any plea bargain, nor has any plea bargain ever been discussed by Mr. Muraskin or the District Attorney and/or me ever.
>
> I went to great lengths to assure you of that. Nevertheless, you proceeded once the jury was impaneled in a course of conduct as if you were not assured of that fact.
>
> You had an opportunity to question Mr. Muraskin, the attorney representing Mr. Abreu, and you had an opportunity to talk with the Assistant District Attomey and talk with me in chambers before the . . . examination began with Mr. Abreu.
>
> Nevertheless, you proceeded along and representing the interests of Mr. Mendez to suggest to this jury that a quote deal unquote had been made, and something was untoward, something was amiss.
>
> . . . .
>
> Nevertheless, you continued and . . . it came out in your examination. . . . of Mr. Abreu that

> Mr. Abreu's case was before this Court as well as Mr. Mendez's case is being tried before me.
>
> . . . .
>
> I found it necessary to make the comment as a trial judge of this case, because what you had intimated was that a deal had been made with respect to Mr. Abreu's case that affects this case and, therefore, you only had one judge that was the judge that dealt with Mr. Abreu's case and Mr. Mendez's case.
>
> For me to remain silent in the face of that would be to invite comment, and the Court found all of the measures that had been taken by it before were occasioned by you in the sense you opened the door, if there's a door opening, to question the Court's veracity whether or not a quote deal end of quote had, in fact, been made.
>
> . . . .
>
> And with that, those are the reasons why your application for a mistrial is most respectfully denied.

(Tr. 223-25.)[3]

The Verdict

On March 19, 1992, the jury found Mendez guilty of second degree murder, attempted murder, assault and weapons possession. (Tr. 583-86.) On April 13, 1992, the trial court sentenced Mendez to twenty-five years to life imprisonment. (4/13/92 Sentence Tr. 9-10.)

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[3] Mendez's brief alleges that "Abreu later pled guilty and at sentencing, the prosecutor 'as agreed' reminded the court that Abreu had cooperated in the case against petitioner." (Mendez Br. at 54.)

The Pretrial Wade Hearing

On March 4 and 5, 1992, the trial court held a Wade and Sandoval hearing to determine, inter alia whether Mendez's photo array and lineup were impermissibly suggestive.

Detective William Martinez testified that after Mendez was arrested, he noted Mendez's pedigree information on the arrest report as 6'2", 190 pounds. (Wade Tr. 29-30.) Detective Martinez photographed Mendez standing in front of a height chart that showed his height to be approximately 6'2". (Wade Tr. 30-31.) Detective Martinez quickly arranged a photo array using the photo of Mendez and standard mug shots of five other "individuals who had similar skin tone, facial hair, their top hair, and more or less kind of like the same age," standing in front of a plain white background. (Wade Tr. 13-16, 33-34, 44.) Detective Martinez said that he did not notice that only Mendez's photo had a height chart in the background. (Wade Tr. 34.) Mendez's photo was number two in the array. (Wade Tr. 13, 17.) Detective Martinez covered the NYSIID numbers of the fillers with a black band across the chest, and put a similar black band on Mendez's photo. (Wade Tr. 44-45.) Detective Martinez showed the photo array to Rodriguez, who without hesitation identified Mendez as the shooter. (Wade Tr. 13, 16-17, 36.)

Detective Martinez took Suarez to the precinct to view a lineup arranged by Detective Ronald Hoering. (Wade Tr. 17-19, 79 88-89, 103-05.) Mendez testified that when he was taken to the lineup room, four other men were already seated; only the center chair, number three, was empty; and Detective Martinez told him to sit in seat number three and put a tag across his chest, which Mendez did. (Wade Tr. 113-14, 119-22.) in contrast, Detective Hoering testified that for all of his lineups, all the seats are empty when the subject is offered a seat, and the fillers sit around him; once everyone is seated, the subject

is offered the opportunity to change seats. (Wade Tr. 20, 89-90.) Detective Hoering testified that Mendez chose seat three. (Wade Tr. 91.) At the lineup, Suarez identified Mendez as the shooter. (Wade Tr. 19.)

Defense counsel argued that the photo array was suggestive because Mendez's photo was the only one with a height chart in the background, which highlighted Mendez as a suspect, and his photo was in the most prominent position in the array. (Wade Tr. 129-32.) Defense counsel argued that the lineup was suggestive because Mendez is a light skinned Hispanic man while the fillers were dark skinned African-Americans, and Detective Hoering put Mendez in the central number three position. (Wade Tr. 85, 123-28.) The prosecutor responded that Mendez is of African descent but "[i]t so happens that this light skinned black man was born on an island . . . where they speak Spanish." (Wade Tr. 86-87, 137-38.) The trial court reserved decision. (Wade Tr. 140.)

On March 12, 1992, after the trial began, the trial court denied Mendez's motion to suppress the pretrial identifications, holding that the State's witnesses were credible, the objections were "of minor significance," and that "[a]fter examining photographs of both the lineup and photo array, . . . the skin tone of all participants was reasonably similar in appearance and, therefore, not a valid basis for suppression of the line-up identification." (Tr. 69-70.)

Mendez's Direct State Appeal

Represented by the Legal Aid Society, Mendez appealed his conviction to the First Department, arguing, inter alia, that the pretrial identification procedures were suggestive, hearsay testimony was improperly admitted, and cross-examination was improperly curtailed. (See Mendez Br. App. at A1-20: Excerpts of Mendez 1st Dep't Br.; Aff. of ADA Elizabeth

Bernhardt ¶ 6 & Ex. 1: Mendez 1st Dep't Br.; Bernhardt Aff. Ex. 2: Mendez Supp. 1st Dep't Br.) See People v. Mendez, 208 A.D.2d 358, 358-59, 617 N.Y.S.2d 5, 6-7 (1st Dep't 1994).

The First Department held that neither the photo array nor the lineup was suggestive:

> We find no impermissible suggestiveness in the fact that defendant's photo was the only one in the array with a height chart rather than a white background, a difference that could not have directed the identifying witness to defendant, since the witness had recognized, described and identified defendant by his street name. Nor do we find any infirmity in the lineup identification arising out of a purported difference in skin tones between defendant and all the fillers, since skin tone was not a feature the witnesses had used to describe the perpetrator, and, when considered with other descriptive features shared by defendant and the fillers, did not in any event create a substantial likelihood that defendant would be singled out for identification.

People v. Mendez, 208 A.D.2d at 358, 617 N.Y.S.2d at 6 (citations omitted). The First Department, however, remanded for a reconstruction hearing because a court officer, instead of the judge, delivered to the jury the "admonition of the court" while neither defendant nor counsel were present, and the record did not disclose what that "admonition" was. Id. at 359, 617 N.Y.S.2d at 7.

After the reconstruction hearing on January 13, 1995, the First Department affirmed Mendez's conviction, holding that there was no evidence that the "admonition" to the jury was

improper. People v. Mendez, 215 A.D.2d 279, 279-80, 627 N.Y.S.2d 345, 346 (1st Dep't 1995).

In his letter to the New York Court of Appeals seeking leave to appeal, Mendez raised his claims that the trial court impermissibly admitted hearsay evidence and curtailed cross-examination, but did not raise his Wade claims. (Bernhardt Aff. Ex. 6: Mendez Leave to Appeal Letter at 2-3.) The New York Court of Appeals denied leave to appeal on September 20, 1995. People v. Mendez, 86 N.Y.2d 844, 634 N.Y.S.2d 454 (1995) (table).

Material Disclosed By Appellate Prosecutor After Trial and Appellate Briefing

On July 13, 1994, after the direct appeal was fully briefed before the First Department, Assistant District Attorney Robert Moore, who handled the appeal for the State, forwarded to Mendez's appellate counsel five documents "pursuant to Brady v. Maryland." (Mendez Br. App. at A34: 7/13/94 Moore Transmittal Letter.) The first document is a handwritten memorandum from ADA Sharlene Brown, dated January 30, 1991, over a year before the trial, and states in full:

> I received a call from Det. Willie Martinez that he received information from officers in Va., that 2 individuals who they have under arrest stated that an individual named Oswaldo D. Rodriguez put out a hit (ordered the killing) of Johnny Rodriguez.[4] Oswaldo ordered the hit because he believed that Johnny stole his money & purchased a Mercedes. Oswaldo now resides in

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[4] To avoid confusion, victim Johnny Rodriguez will be referred to in this Report and Recommendation as "Rodriguez" or "Johnny," and Oswaldo Rodriguez will be referred to as "Oswaldo."

> Santo Domingo & still wants Johnny dead. I told Det. Martinez to notify Johnny of the possible danger to his life. I also asked Det. Martinez (again) to interview & take a statement from William Tyrone. Det. Martinez informed me that Tyrone is no longer at Rikers [Island Correctional Facility] and that Det. Zopane also needs him on a case & if Zopane finds him, he will notify Det. Martinez.

(Mendez Br. App. at A36-37: 1/30/91 ADA Sharlene Browne Memo, emphasis added.)

The second document is a handwritten note in Detective Martinez's file, and states:

> Romul[o] Alberto DeLeon - Virginia Prison
> states Oswaldo Daniel Rodriguez informed him that Johnny Rodriguez had his mother[']s apartment robbed of $100,000.00 cash that he had put away there. Oswaldo stated that because of this he ordered to have him hit.
>
> Johnny Rodriguez. Small time drug dealer buys black Mercedes Benz shortly after robbery.
>
> The night before the robbery Johnny Rodriguez and Oswaldo Rodriguez were shooting pool. Oswaldo began to brag about all the money he has been sending to the Dominican Republic[,] also about the $100,000.00 he has at his mothers.
>
> Francis Paulino M/H 7/21/70 FBI#312052LA9
> 2685 Grand Concourse
> was tied up in the apartment during the robbery.

Oswaldo Daniel Rodriguez M/H 8/21/63 6'2"
165 lbs. aka: Ossie

Narcotics Investigators
Steve Straka
Sam Doyle

(Mendez Br. App. at A38: Det. Martinez Notes.)

The third document is a redacted Drug Enforcement Administration ("DEA") report of Virginia Detective Stephen Straka's interview with DeLeon, and states:

> DELEON stated he had no direct knowledge of any murders, but he was told by OSWALDO . . . [that] OSWALDO had ordered a murder of a Dominican named Johnny. DELEON stated [that] OSWALDO . . . secured . . . $100,000.00 in a safe at his mother's apartment.
>
> DELEON stated OSWALDO often boasted and he recalled OSWALDO telling the Dominican Johnny about his success and the $100,000.00 while they were shooting pool at a New York pool hall. DELEON stated the following day two unidentified subjects came [to OSWALDO's] mother's apartment where they found OSWALDO's cousin, Francisco PAULINO present. [Someone] tied PAULINO with telephone cable and threatened him with a weapon. PAULINO, who [knew] the combination to the safe, gave it to the subjects who in turn stole the [$100,000.00].
>
> DELEON stated he was told this story by OSWALDO who was very angry and threatening

to [kill] whoever did the theft. DELEON stated OSWALDO suspected his ex-girlfriend, Esella Guzman, ADA Gi Gi, or Johnny, who knew about the money and had previously dated GUZMAN. DELEON stated as time went on OSWALDO became sure Johnny ordered the theft due to an extravagant change in Johnny's lifestyle.

DELEON stated approximately two months later, upon a return trip to New York City [with] Edwin, following a trip to the Dominican Republic, Edwin told DELEON he had spoken to OSWALDO, who was now living in Long Island. Edwain told DELEON that OSWALDO had [ ] murdered and arranged the murder through ALFREDO who had the people do the killing.

DELEON stated the next day he and Edwin were . . . near Jerome Avenue, where they spoke to a kid who asked if they heard about the shooting. The kid told them there was a big shooting near the grocery store [and] three or four people were shot. The kid said one person was shot 13 times and the [ ] had sprayed the whole block. When the kid walked on, Edwin told DELEON that was [ ] and the murder OSWALDO ordered.

DELEON stated that weekend he played softball and met OSWALDO at the ball field. [DELEON] stated OSWALDO was bragging about the shooting and how it was done. OSWALDO told [him] one of the guys walked up to Johnny on the sidewalk, asked how he was doing, and shot him in the stomach with a 9mm. OSWALDO said

> three guys then came out of a car with MAC 10's and sprayed the whole block.
>
> . . . .
>
> DELEON stated the next week he and Edwin [were] in the New York neighborhood [ ] they saw the kid who told them about the shooting. The kid told them the guy who had been shot 13 times was still alive. DELEON stated he and Edwin later related this to OSWALDO. OSWALDO told them as soon as Johnny got out of the hospital he was going to see [ALFREDO] and have the same guys do it again.

(Mendez Br. App. at A39-40: Det. Straka 12/21/90 interview notes, emphasis added.)[5]

The fourth document is a redacted DEA report of Detective Straka's interview with Alfrato Matos-Peralta, and states:

> MATOS stated he is unaware of any violence committed by Oswaldo RODRIGUEZ. He stated he was aware Oswaldo became furious over the money being stolen from his mother and [ ]. MATOS stated Oswaldo told him that the person who stole the money was a boyfriend of [ ] GI GI GUZMAN and he had struck Oswaldo's mother during the robbery. Oswaldo told MATOS he wanted to kill him for hitting his mother.

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[5] The omitted words are not legible in the best copy of the document that the Court received from the parties.

> MATOS stated he spoke with Oswaldo at a later date and Oswaldo told MATOS someone shot the guy who struck his mother. MATOS stated he had no knowledge of who did the shooting or if Oswaldo had any involvement in the shooting.

(Mendez Br. App. at A41: Det. Straka 5/25/92 interview notes, emphasis added.)

The fifth document is a redacted DEA report of Virginia Detective Dale's interview with Francisco Antonio Perez, and states:

> Perez provided the following in July 1990, a subject known as Johnny Rodriguez goes to Ossie's mother's apartment [and takes] $100,000.00 of Ossie's money. Later, Ossie found out about this because Johnny bought a Mercedes Benz. Perez is in Virginia everyone else is in New York. Franklin calls and tells Perez that Ossie had Johnny "fucked up." Franklin tells Perez that Ossie went to Alfredo and Alfredo got Ossie four [ ] known as "Machederos" a street [gang] in the Dominican Republic. They work for Alfredo. Ossie to pay them $8,000.00. They shoot Johnny thirteen times with Ossie's [sic] someone is killed. A few days later after Franklin calls Perez to tell him. Perez, Ossie, Franklin and Frankie Paulino go in front of the garage where Ossie meets one of the hitmen and Alfredo and pays the money and is told that their hits are guaranteed and if Johnny lives he will get hit again. Perez said the hit man was driving a blue Toyota Celica NY tags.

(Mendez Br. App. at A42: Det. Dale 3/17/91 interview notes, emphasis added.)

On August 15, 1994, ADA Moore sent Mendez's appellate counsel another letter, "pursuant to Brady v. Maryland," disclosing that:

> On August 10, 1994, [ADA Moore] spoke with Detective Stephen Straka of the Arlington, Virginia Police Department. He advised me that he had recently spoken with Oswaldo Rodriguez regarding the shooting of "Johnny Rodriguez," and that Oswaldo Rodriguez told him, in sum and substance, about his suspicion that "Johnny Rodriguez" had burglarized his mother's apartment and stolen his money, that he told Alfrato Matos about it, and that Matos said to him, in sum and substance, that he (Matos) would take care of it.

(Mendez Br. App. at A43: 8/15/94 Moore Letter, emphasis added.)

Mendez's CPL § 440.10 Motion Hearing

In September 1995, Mendez filed a CPL § 440.10 motion with the trial judge to vacate his conviction on the ground that the prosecutor failed to turn over Rosario and Brady material. (Pet. ¶ 11(a)(1)-(3); Bernhardt Aff. ¶ 11.)[6] On March 25, 1996,

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[6] This was Mendez's third § 440.10 motion. On July 1, 1992, the trial court denied Mendez's first § 440.10 motion which he had filed pro se on May 6, 1992. (Bernhardt Aff. ¶ 9 & Ex. 9: Justice Covington § 440.10 decision at 2.) The Legal Aid Society filed the second CPL § 440.10 motion on Mendez's behalf on December 7, 1993. (Bernhardt Aff. ¶ 10.) After a hearing on March 21, 1994, the trial court denied the second motion. (Bernhardt Aff. ¶ 10 & Ex.

(continued...)

the trial court granted a hearing (Bernhardt Aff. ¶ 11), which began on April 26, 1996 and continued on May 3 and 17, 1996, and June 7, 1996. (See generally § 440. 10 Tr.; see also Bernhardt Aff. Ex. 9: Justice Covington § 440.10 decision at 1.)

At the hearing, Detective Martinez testified that sometime in late 1990 or early 1991 Virginia Detectives Straka and Dale telephoned him to say that they had Mr. DeLeon and another person in custody, who both stated that Oswaldo had been bragging about having put out a hit on Johnny Rodriguez because Oswaldo thought Johnny had stolen money from him. (§ 440.10 Tr. 62-64, 70.) Detective Martinez gave this information to ADA Browne, who instructed him to make sure he informed Johnny Rodriguez. (§ 440.10 Tr. 65, 72.) Detective Martinez also testified that the extent of his investigation into the information was to ascertain whether Oswaldo had filed a police complaint report for the robbery. (§ Tr. 440.10, Tr. 66, 67-68, 70-71.) Since no complaint had been filed, Detective Martinez dropped the investigation because "[i]t didn't have anything to do with the homicide as far as [he) was concerned." (§ 440. 10 Tr. 66, 74.) Detective Martinez told Johnny Rodriguez that there was a contract out on his life, but he did not ask how or where Johnny acquired his black Mercedes Benz. (§ 440. 10 Tr. 71-72.)

When ADA Sharpe took over the case from ADA Browne, she found Browne's note to the file that Detective Martinez had spoken to the Virginia officers about a hit Oswaldo had ordered on Rodriguez. (§ 440.10 Tr. 6-12, 15, 41.) ADA Sharpe spoke to Detective Martinez to find out more about what he and the Virginia detectives had discussed, and understood that "whatever Det[ective] Martinez did and the conversation he

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[6](...continued)
9: Justice Covington § 440.10 decision at 2.) Neither the first nor second motions are relevant to Mendez's current habeas petition.

had, whatever action he took, this was unfounded, the story by the two individuals that there was a hit out on Johnny Rodriguez was unfounded." (§ 440.10 Tr. 13, 15-16, 29-32.) ADA Sharpe asked Johnny Rodriguez "what about Oswaldo Rodriguez, what about this . . . hit, and he had no knowledge." (§ 440.10 Tr. 17, 25-26.) ADA Sharpe did not conduct a further investigation because she "expected that whatever was to be done regarding that would have been done" by former ADA Browne and Detective Martinez. (§ 440. 10 Tr. 22, 30-32, 37.)

Despite the fact that ADA Sharpe testified that the hit information was unfounded, she thought that there might be a connection with the homicide: "I think I'd be negligent as an attorney if there is some story, especially given the community and society that we live in, that there is a hit put out, that there's a shooting, and I in some way did not think that maybe [they] are related." (§ 440.10 Tr. 46.) ADA Sharpe stated, however, that she did not reveal the information to the defense because she viewed the note to the file as an alert to the next person handling the case that a hit was out on a witness, and she "was not going to have any . . . witnesses testify about anything about a hit" since there was no proof of it. (§ 440.10 Tr. 28, 38-39, 42-43, 46-47.) ADA Sharpe elaborated: "[O]ne of my concerns at the time that I saw this note was whether Hilden Mendez, your client, was in fact the hit man hired to execute Johnny Rodriguez. And one of the things I did not want to do at trial was to have any evidence regarding a hit come out against your client when there was no such verifiable information. . . . I did not want any information to come out from any of my witnesses that your client was the possible hit man." (§ 440. 10 Tr. 28; see also id. 42-43, 46-47.) ADA Sharpe did not give the note or other information about the hit to Mendez's trial defense counsel. (§ 440. 10 Tr. 28, 38.)

When Robert Moore, a twenty-four year veteran Assistant District Attorney, was assigned to Mendez's appeal, he

discovered the notes, and after he filed the State's First Department brief on the appeal, called Detectives Straka and Dale. (§ 440.10 Tr. 76-78, 80, 83-84.) Detectives Straka and Dale sent ADA Moore their documents concerning the hit, which ADA Moore sent on to Mendez's appellate counsel. (§ 440-10 Tr. 80-86, 90-92; Mendez Br. App. at A34-43.)

Mendez's trial counsel Steven Kaiser confirmed that he never learned of a motive for the shooting other than the one the State proffered at trial: that Mendez shot at Johnny Rodriguez because Johnny was with someone who previously shot at Mendez. (§ 440.10 Tr. 108-10.) Kaiser confirmed that the prosecution never informed him that someone claimed Oswaldo put out a hit on Johnny. (§ 440.10 Tr. 108-10.) Kaiser testified that if he had been told this information before trial, he would have hired an investigator to speak with Detectives Straka and Dale, Oswaldo, DeLeon, Paulino and Perez. (§ 440.10 Tr. 110-11.) Kaiser also testified that he would have cross-examined Detective Martinez "much more thoroughly as to the shallowness of the investigation," and his cross-examination of Johnny about his Mercedes would have been different. (§ 440.10 Tr. 112-15.)

When Mendez's appellate counsel received the material from ADA Moore, he hired private investigator Joseph Barry. (§ 440.10 Tr. 100.) Barry found 0swaldo, who "of course . . . denied ordering the hit [and] denied knowing anything about who shot Johnny," but admitted that he knew Johnny as well as Matos, DeLeon and Paulino, but did not know Mendez. (§ 440.10 Tr. 102-03, 106.) Barry also found DeLeon and Paulino both of whom testified at the hearing and confirmed what was written in Detective Martinez's note and Detectives Straka and Dale's records. (§ 440-10 Tr. 100-01, 104-06, 125-133, 143-62, 166, 177, 181-92.) Neither DeLeon, Paulino nor Oswaldo knew anyone named Hilden Mendez or Tony Mendez. (§ 440.10 Tr. 106, 156, 185-86.)

On December 12, 1996, the trial judge issued his written decision denying Mendez's request for a new trial, holding, inter alia, that there was no Brady violation:

> The notes of the prosecutor and Detective Martinez were not favorable to the defense and did not tend to exculpate defendant of the charges. The value of the notes lies solely in their nature as a possible "investigatory lead." A "lead" itself is not exculpatory. In the instant case the "lead" advances the idea that possibly someone else (Oswaldo Daniel Rodriguez) may have wanted to kill Johnny Rodriguez, who was injured in the incident which resulted in the defendant being charged with Murder [in the second degree] and related charges.
>
> It is entirely possible that this lead is totally unrelated to the incident involving this defendant, or that this defendant was, in fact, carrying out the purported "hit." In any event, this lead, standing by itself, does not in any way tend to exculpate the defendant. Moreover, the hearsay nature of the statement contained in the notes and the requirements that must be met to qualify this statement as a declaration against penal interest makes its admissibility at trial extremely doubtful.

(Mendez Br. App. at A31-32 & Bernhardt Aff. Ex. 9: 12/12/96 Justice Covington § 440.10 decision at 3-4, emphasis added.)

The First Department denied leave to appeal on April 15, 1997. (Mendez Br. App. at A33; see also Pet. ¶ 11 (c); Bernhardt Aff. ¶ 12.)

ANALYSIS

I. THE BRADY V. MARYLAND STANDARD

Under Brady v. Maryland and its progeny, state as well as federal prosecutors must turn over exculpatory and impeachment evidence, whether or not requested by the defense, where the evidence is material either to guilt or to punishment. See, e.g., Strickler v. Greene, 119 S. Ct. 1936, 1948 (1999); United States v. Bagley, 473 U.S. 667, 676, 682, 105 S. Ct. 3375, 3380, 3383-84 (1985); United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 2399 (1976); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); see also, e.g., United States v. Diaz, 176 F.3d 52, 108 (2d Cir.), cert. denied, 120 S. Ct. 181 (1999); Tankleff v. Senkowski, 135 F.3d 235, 250 (2d Cir. 1998); Franza v. Stinson, 58 F. Supp. 2d 124, 153 (S.D.N.Y. 1999) (Kaplan, D.J. & Peck, M.J.); Orena v. United States, 956 F. Supp. 1071, 1090-92 (E.D.N.Y. 1997) (Weinstein, D.J.). The Brady rule also encompasses evidence known only to the police: "In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" Strickler v. Greene, 119 S. Ct. at 1948 (quoting Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567 (1995)).

The Brady rule does not require a prosecutor to "deliver his entire file to defense counsel," but only to disclose those items which are material to the defendant's guilt or punishment. United States v. Bagley, 473 U.S. at 675, 105 S. Ct. at 3380; accord, e.g., Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567 (1995) ("We have never held that the Constitution demands on open file policy."); United States v. Agurs, 427 U.S. at 108-09, 96 S. Ct. at 2400; Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992); United States v. Gaggi, 811 F.2d 47, 59 (2d Cir.), cert. denied, 482 U.S. 929, 107 S. Ct. 3214 (1987); Hoover v.

Leonardo, No. 91-CV-1211, 1996 WL 1088204 at *2 (E.D.N.Y. June 11, 1996).

"There are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3) prejudice must have ensued." Strickler v. Greene, 119 S. Ct. at 1948; see also, e.g., Moore v. Illinois, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 2568 (1972); United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995), cert. denied, 516 U.S. 1165, 116 S. Ct. 1056 (1996); Orena v. United States, 956 F. Supp. at 1090. The second component (suppression) is not at issue in this case, since the State does not dispute that the evidence in question was not produced to Mendez's counsel before trial. (§ 440. 10 Tr. 108-10; see Mendez Br. App. at A34, A43.) The remaining two issues depend on whether the undisclosed information was material and exculpatory.

The Supreme Court has emphasized four aspects of materiality. First, "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles v. Whitley, 514 U.S. at 434, 115 S. Ct. at 1565-66 (citing, inter alia, United States v. Bagley, 473 U.S. at 682, 105 S. Ct. at 3383); accord, e.g., Tankleff v. Senkowski, 135 F.3d at 250; Hoover v. Leonardo, 1996 WL 1088204 at *3. Thus, nondisclosed "evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Strickler v. Greene, 119 S. Ct. at 1948 (quoting United States v. Bagley, 473 U.S. at 682, 105 S. Ct. at 3383) (emphasis added); accord, e.g., Kyles v. Whitley, 514 U.S. at 433-34, 115 S. Ct. at 1565. The "touchstone of materiality is a

'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. at 434, 115 S. Ct. at 1566 (quoting United States v. Bagley, 473 U.S. at 678, 105 S. Ct. at 3381); see also, e.g., Strickler v. Greene, 119 S. Ct. at 1953; United States v. Diaz, 176 F.3d at 108; Tankleff v. Sankowski, 135 F.3d at 250; United States v. Amiel, 95 F.3d 135, 144-45 (2d Cir. 1996); United States v. Payne, 63 F.3d at 1209; Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir.), cert. denied, 488 U.S. 890, 109 S. Ct. 224 (1988); Orena v. United States, 956 F. Supp. at 1092; Hoover v. Leonardo, 1996 WL 1088204 at *3.

Second, the sufficiency of the evidence is not the touchstone of materiality:

> The second aspect of . . . materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles v. Whitley, 514 U.S. at 434-35, 115 S. Ct. at 1566; accord, e.g., Strickler v. Greene, 119 S. Ct. at 1952; Orena, v. United States, 956 F. Supp. at 1092; Hoover v. Leonardo, 1996 WL 1088204 at *3. "This means that the omission must be evaluated in the context of the entire record." United States v. Agurs, 427 U.S. at 112, 96 S. Ct. at 2402. "'If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses . . . had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glance, the result might well be different.'" Id. at 113 n.21, 96 S. Ct. at 2402 n.21.

Third, once constitutional error has been established there is no need for harmless error review, since "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different' . . . necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict.'" Kyles v. Whitley, 514 U.S. at 435, 115 S. Ct. at 1566; accord, e.g., Orena v. United States, 956 F. Supp. at 1092; Hoover v. Leonardo, 1996 WL 1088204 at *3.

Fourth, in determining materiality, the "suppressed evidence [is] considered collectively, not item by item." Kyles v. Whitley, 514 U.S. at 437, 115 S. Ct. at 1567; accord e.g., United States v. Persico, 164 F.3d 796, 805 (2d Cir.), cert. denied, 120 S. Ct. 171 (1999); Orena v. United States, 956 F. Supp. at 1092; Hoover v. Leonardo, 1996 WL 1088204 at *3.

II. APPLICATION OF THE BRADY STANDARD TO MENDEZ'S CASE[7]

A. Evidence Of an Alternative Suspect With Equal Opportunity and Motive Is Favorable To Mendez

The State argues that the information that Oswaldo put out a hit on Johnny Rodriguez is not Brady material because it is not favorable and does not tend to exculpate Mendez. (State Br. at 18.) According to the State, the most it does is "'advance the idea that possibly someone else . . . may have wanted to kill Johnny Rodriguez.'" (Id. at 18, quoting trial court opinion at Mendez Br. App. at A32.)

In this instance, advancing the idea that someone else wanted to kill Johnny Rodriguez for an entirely different motive than Mendez's alleged motive as advanced by the prosecution at trial would have given Mendez the opportunity to establish reasonable doubt in the jury's mind as to who shot Johnny Rodriguez. Although Oswaldo's contract on Johnny Rodriguez's life does not rule out the possibility that Mendez was the hit man, the State had no evidence that there was any connection between Mendez and Oswaldo, since neither DeLeon, Paulino nor Oswaldo knew Mendez. (§ 440.10 Tr. 106, 156, 185-86.) Moreover, Oswaldo's motive for killing Johnny—that he believed that Johnny stole $100,000 from him—is more compelling than the State's trial theory that Mendez tried to kill Johnny because Johnny was present when another man shot at Mendez.

With this information, defense counsel could have discredited Johnny, who had already given two different

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[7] The Court addresses the effect of the Antiterrorism and Effective Death Penalty Act's review standard in Point III below.

descriptions of the shooter. For example, defense counsel could have asked Johnny whether he was pointing a finger at Mendez so that he would not get into further trouble with Oswaldo.[8] Since the suppressed evidence would have cast doubt upon the shooter's identity, as well as the State's motive theory, the existence of Oswaldo as an alternative suspect was favorable to Mendez. See, e.g., United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995) ("report was potentially exculpatory, because it identified an alternative suspect"); Smith v. Secretary of New Mexico Dep't of Corrections, 50 F.3d 801, 829-30 (10th Cir.) ("information relating to [alternative suspect's] presence near the vicinity of the bodies on two separate occasions, to the clothes taken from his car and to his status as a suspect in [the] investigation" is Brady material), cert. denied, 516 U.S. 905, 116 S. Ct. 272 (1995); Bowen v. Maynard, 799 F.2d 593, 600-601, 610-613 (10th Cir.) (Defendant had a right to Brady information that victim was killed "because he had 'ripped off' . . . the reputed head of organized crime in Charleston, South Carolina, . . . that the hit man had

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[8] Mendez argues that "the undisclosed evidence indicated that Johnny Rodriguez was a drug dealer and that he had committed a robbery. Hence, defense counsel would have had a good faith basis to impeach Johnny Rodriguez's credibility with these prior bad acts." (Mendez Br. at 40.) Johnny admitted at trial, however, that he had pled guilty to criminal possession of a weapon and in another instance pled guilty to harassment. (Tr. 80, 140-42, 162-63, 167.) The fact that Johnny also dealt drugs and committed robbery would have been merely cumulative credibility impeachment evidence. Cumulative impeachment evidence is not Brady material. See, e.g., United States v. Diaz, 176 F.3d 52, 108 (2d Cir.) ("suppressed impeachment evidence is not material where the new evidence merely constitutes 'an additional basis on which to impeach a witness whose credibility has already been shown to be questionable'"), cert. denied, 120 S. Ct. 181 (1999); United States v. Orena, 145 F.3d 551, 559 (2d Cir. 1998), cert. denied, 119 S. Ct. 805 (1999); Tankleff v. Senkowski, 135 F.2d 235, 251 (2d cir. 1998); United States v. Amiel, 95 F.3d 135, 145 (2d Cir. 1996); United States v. Zagari, 111 F.3d 307, 320-21 (2d Cir.), cert. denied, 118 S. Ct. 445, 455 (1997); United States v. Wong, 78 F.3d 73, 79 (2d Cir. 1996); United States v. Payne, 63 F.3d 1200, 1210 (2d Cir. 1995), cert denied, 516 U.S. 1165, 116 S. Ct. 1056 (1996).

come from Charleston," and that "South Carolina authorities considered [alternative suspect] the prime suspect in [victim's] murder"), cert. denied, 479 U.S. 962, 107 S. Ct. 458 (1986); Miller v. Angliker, 848 F.2d 1312, 1321-23 (2d Cir.) (Granting habeas corpus because suppressed evidence that another person was arrested for murders with same modus operandi, in the same area and with an equally persuasive motive was Brady material and should have been disclosed to defendant before he pleaded guilty), cert. denied, 488 U.S. 890, 109 S. Ct. 2241 (1988); Iarrell v. Balkcom, 735 F.2d 1242, 1258 (11th Cir. 1984) ("Brady requires the prosecution to produce evidence that someone else may have committed the crime."), cert. denied, 471 U.S. 1103, 105 S. Ct. 2331 (1985); Sellers v. Estelle, 651 F.2d 1074, 1075, 1077 (5th Cir. 1981) (suppressed police reports revealing that alternative suspect admitted his part in the offense with which defendant was charged is Brady material), cert. denied, 455 U.S. 927, 102 S. Ct. 1292 (1982); United States, v. Chandler, 950 F. Supp. 1522, 1538 (N.D. Ala. 1996) (ordering hearing on defendant's Brady claim that prosecution suppressed evidence that witness "gave a statement to the . . . Police, in which [witness] recited that [third party] had admitted to killing [victim]"); Joseph v. Whitley, Civ. A. No. 92-2335, 1992 WL 345112 at *3 (E.D. La. Nov. 5, 1992) ("The identity of other possible suspects, if withheld from the defense, may give rise to a successful Brady claim."), aff'd, 12 F.3d 1097 (5th Cir. 1993), cert. denied, 511 U.S. 1039, 114 S. Ct. 1558 (1994); United States v. Stifel, 594 F. Supp. 1525, 1541 (N.D. Ohio 1984) ("The identify of the bomb sender was a question for the jury, and defendant should have been apprised of evidence showing that someone other than himself had equal motive, access to materials, and other surrounding circumstances implicating him as the guilty party. The burden on the defendant for purposes of this case is only to show that the prosecution's suppressed evidence could have created a reasonable doubt. In terms of the [alternative suspect] evidence, defendant need not prove that [alternative suspect] committed the crime, but only that the evidence

against [alternative suspect] raised a reasonable doubt as to [defendant's] guilt."); People v. Robinson, 133 A.D.2d 859, 859-60, 520 N.Y.S.2d 415, 416 (2d Dep't 1987) ("[i]t was established that during the investigation of the crimes of which the defendants stand convicted, the police obtained a statement from a certain individual who directly implicated three men other than the defendants as the perpetrators. Even if the prosecution had valid reasons to consider this witness to be unreliable, it should nonetheless have provided the defense with this important exculpatory information which was clearly Brady material."); People v. Jackson, 154 Misc. 2d 718, 732-33, 593 N.Y.S.2d 410, 419-20 (Sup. Ct. Kings Co. 1992) (Brady violation where suppressed expert opinion by detective that fire was accidental would have led defendant to alternative and better trial strategies), aff'd, 198 A.D.2d 301, 603 N.Y.S.2d 558 (2d Dep't 1993), appeal denied, 83 N.Y.2d 806, 611 N.Y.S.2d 142 (1994); People v. Lumpkins, 141 Misc.2d 581, 589-90, 533 N.Y.S.2d 792, 797 (Sup. Ct. Kings Co. 1988) (defendant entitled to information that witness called police and told them two other men killed victim).[9]

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[9] As noted above, the State's view is that this information is not exculpatory because Mendez could have been the hit person hired by Matos on behalf of Oswaldo. (State Br. at 17-20.) While not cited by either party, the Court's research reveals an unpublished Second Circuit decision that, arguably, supports the State's position. See Pidgeon v. New York State Bd. of Parole, No. 97-2428, 173 F.3d 845 (table), 1999 WL 197183 at *2 (2d Cir. April 2, 1999). In that case, while Pidgeon was incarcerated pending trial, "three burglaries similar in modus operandi" were committed by Elliot, who also physically resembled Pidgeon. Id. at *1. The State did not disclose this information to Pidgeon. Id. The Second Circuit found that the information clearly was favorable to Pidgeon but not sufficient to constitute a Brady violation because of the eyewitness's multiple identifications of Pidgeon. Id. at *2. Moreover, the victim's "description of her second assailant leaves open the possibility that he was Elliot and that, as [the police] suspected, Pidgeon and Elliot were partners in crime." Id. The Second Circuit concluded that "the potential exculpatory effect of the information known to Detective Branca is both indirect and speculative in nature and, as a result, is insufficient to shake

(continued...)

B. Even if the Prosecutor Thought the Information Was Unreliable, Because It Was Material to Mendez's Guilt It Had To Be Disclosed

The State claims that since none of the witnesses who came forward had firsthand knowledge of the hit, the information that Oswaldo put out a hit on Johnny Rodriguez was not reliable, and therefore the State did not have a duty to disclose it to Mendez before trial. (State Br. at 16-17.) However, it is for the jury, not the prosecutor, to decide whether favorable information in a police record is credible; otherwise "prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting Brady at nought." Lindsey v. King, 769 F.2d 1034, 1040 (5th Cir. 1985). If the evidence is favorable to the accused, as the evidence that someone other than Mendez confessed to putting out a hit on Rodriguez clearly is (see Point II.A, above), then it must be disclosed, even if the prosecution believes the evidence is not thoroughly reliable. See, e.g., Lindsey v. King, 769 F.3d at 1040; People v. Fein, 18 N.Y.2d 162, 172, 272 N.Y.S.2d 753, 759 (1966) ("there are . . . circumstances in which a prosecutor should know that even testimony which he honestly disbelieves is of a type which in all probability would make it very persuasive to a fair-minded jury"); People v.

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[9](...continued)
our confidence in the verdict." Id.

First, as an unpublished opinion, Pidgeon is of no precedential value. Second, in Pidgeon, the sole victim repeatedly identified Pidgeon, while here two witnesses identified Mendez while two others said he was not the shooter, and the two witnesses who identified Mendez had given the police different descriptions which did not fit Mendez. Third, there was no evidence connecting Mendez to Oswaldo or Matos (§ 440.10 Tr. 106, 156, 185-86), while in Pidgeon the police suspected Pidgeon and Elliot of being partners in crime. For these reasons, the withheld evidence in this case does "shake our confidence in the [trial] verdict." Pidgeon is inapplicable and, in any event, of no precedential value.

Robinson, 133 A.D.2d 859, 859-60, 520 N.Y.S.2d 415, 416 (2d Dep't 1987) ("[D]uring the investigation of the crimes of which the defendants stand convicted, the police obtained a statement from a certain individual who directly implicated three men other than the defendants as the perpetrators. Even if the prosecution had valid reasons to consider this witness to be unreliable, it should nonetheless have provided the defense with this important exculpatory information which was clearly Brady material."); People v. Jackson, 168 Misc. 2d 182, 187, 637 N.Y.S.2d 158, 162 (Sup. Ct. Bronx Co. 1995) ("The prosecutor's unilateral decision to withhold [witness's exculpatory] statements because he questioned his credibility was improper. His belief, even if held in good faith, does not overcome the violation. He should have turned over the statements, and his failure to do so on the grounds of his personal assessment that the witness was unreliable is inexcusable."); People v. Lumpkins, 141 Misc. 2d 581, 588, 533 N.Y.S.2d 792, 796 (Sup. Ct. Kings Co. 1988) ("'Even if' the detective 'had valid reasons to consider this witness to be unreliable, [he] should nonetheless have provided the defense with this important exculpatory information which was clearly Brady material.'").

In this case, therefore, it is no excuse that the prosecution did not think the information reliable; since it was material to Mendez's guilt (see page 25 above), it had to be disclosed.

C. Oswaldo's Admission is A Statement Against Penal Interest And Thus Not Hearsay

Several decisions in this district have held that suppressed information that would be inadmissible at trial does not violate Brady since it could not have affected the trial's outcome. See, e.g., Shakur v. United States, 32 F. Supp. 2d 651, 671 (S.D.N.Y. 1999)("undisclosed evidence cannot form a basis for post-trial relief [under Brady] if that evidence could not have been admitted at the trial in any event"); Phillips v. Walker, 92 Civ.

8018, 1996 WL 1236 at *3 (S.D.N.Y. Jan. 2, 1996) (Sotomayor, D.J.) (no Brady violation where doorman's identification of killer was inadmissible since doorman was deceased), aff'd mem., 107 F.3d 3 (2d Cir. 1997); Scarpati v. United States, 93 Civ. 740, 1994 WL 256691 at *3 (S.D.N.Y. Jule 7, 1994) ("No Brady violation occurred. The (withheld FBI] report was not material since it was not admissible. . . ."), aff'd, 50 F.3d 4 (2d Cir. 1995); United States v. Persico, 84 Cr. 809, 1993 WL 385799 at *7 (S.D.N.Y. Sept. 29, 1993).

Other circuits, however, have found inadmissible evidence to be material for Brady purposes if it "would have led to admissible evidence." Wright v. Hopper, 169 F.3d 695, 703 & n.1 (11th Cir.), cert. denied, 120 S. Ct. 336 (1999); see, e.g., Felder v. Johnson, 180 F.3d 206, 212 (5th Cir.) (noting that in the Fifth Circuit, "inadmissible evidence may be material under Brady," and discussing different circuit approaches to the issue), cert. denied, 120 S. Ct. 630 (1999); see also cases cited in Point II.E below. While the Court believes that the better view is that inadmissible evidence may be material for Brady purposes if it would lead to admissible evidence, the Court need not decide that issue here, because, despite Justice Covington's passing doubts (see page 20 above), it seems clear that the suppressed information would have been admissible. Oswaldo's admission that he put a hit out on Johnny Rodriguez because he thought Johnny had stolen $100,000 is a statement against penal interest by 0swaldo, an exception to the hearsay rule, and therefore admissible.

The New York Court of Appeals has set forth four factors which qualify a declaration against penal interest for admission:

> To qualify for admission into evidence as a declaration against the maker's penal interest the following elements must be present: first, the

> declarant must be unavailable as a witness at trial; second, when the statement was made the declarant must be aware that it was adverse to his penal interest; third, the declarant must have competent knowledge of the facts underlying the statement; and, fourth, and most important, supporting circumstances independent of the statement itself must be present to attest to its trustworthiness and reliability.

People v. Settles, 46 N.Y.2d 154, 167, 412 N.Y.S.2d 874, 882 (1978).[10]

Declarations against penal interest which inculpate a defendant are subject to a "more exacting scrutiny than others." People v. Thomas, 68 N.Y.2d at 198, 507 N.Y.S.2d at 975; accord, e.g., People v. Brensic, 70 N.Y.2d at 15, 517 N.Y.S.2d at 122; People v. Smith, 195 A.D.2d at 125, 606 N.Y.S.2d at 664; People v. Fonfrias, 204 A.D.2d 736, 738, 612 N.Y.S.2d 421, 423 (2d Dep't 1994). With such declarations, "[t]he interest compromised must be of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify." People v. Thomas, 68 N.Y.2d 198, 507 N.Y.S.2d at 975; accord, e.g., People v. Brensic, 70 N.Y.2d at 15, 517 N.Y.S.2d at 122; People v. Fonfrias, 204 A.D.2d at 738, 612 N.Y.S.2d at 423. In contrast, declarations, such as Oswaldo's, which exculpate a defendant are subject to a more lenient standard. See, e.g., People v. Settles, 46 N.Y.2d at 169-70, 412 N.Y.S.2d at 884; People v. Darrisaw, 206 A.D.2d at 664, 614 N.Y.S.2d at 625; People v.

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[10] Accord, e.g., People v. Brensic, 70 N.Y.2d 9, 15, 517 N.Y.S.2d 120, 122 (1987); People v. Thomas, 68 N.Y.2d 194, 197, 507 N.Y.S.2d 973, 975 (1986), cert. denied, 480 U.S. 948, 107 S. Ct. 1609 (1987); People v. Darrisaw, 206 A.D.2d 661, 663-64, 614 N.Y.S.2d 622, 624 (3d Dep't 1994); People v. Smith, 195 A.D.2d 112, 121, 606 N.Y.S.2d 656, 662 (1st Dep't), appeal denied, 83 N.Y.2d 876, 613 N.Y.S.2d 137 (1994); see also, e.g., Lyons v. Johnson, 912 F. Supp. 679, 685 (S.D.N.Y.), aff'd, 99 F.3d 499 (2d Cir. 1996).

Smith, 195 A.D.2d at 125, 606 N.Y.S.2d at 664; People v. Fonfrias, 204 A.D.2d at 738, 612 N.Y.S.2d at 423. "When an exculpatory statement is proffered by the defense, however, it is enough that the supportive evidence establishes '"a reasonable possibility that the statement might be true."'" People v. Darrisaw, 206 A.D.2d at 664, 614 N.Y.S.2d at 625 (quoting People v. Smith, 195 A.D.2d at 123, 606 N.Y.S.2d at 663 (quoting People v. Settles, 46 N.Y.2d at 169-70, 412 N.Y.S.2d at 884)); see also, e.g., People v. Fonfrias, 204 A.D.2d at 738, 612 N.Y.S.2d at 423. "Moreover, where the statement forms a critical part of the defense, due process concerns may tip the scales in favor of admission." People v. Darrisaw, 206 A.D.2d at 664, 614 N.Y.S.2d at 625 (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)).

Here, Oswaldo's admission satisfied all four conditions. First, Oswaldo would presumably have refused to testify at Mendez's trial and hence been unavailable. Second, no serious argument can be made that Oswaldo was not aware that his admission that he put out a hit on Johnny Rodriguez was "adverse to his penal interest." Third, since Oswaldo told Matos to execute the hit, and Matos hired others to do the actual killing, Oswaldo could not be expected to know the details of the shooting; however, his admissions demonstrated a firsthand knowledge of the specific facts precipitating the hit. For example, Oswaldo knew that Johnny had a black Mercedes. (Mendez Br. App. at A36-38, A42.) Oswaldo also told DeLeon that "one of the guys walked up to Johnny on the sidewalk, asked how he was doing, and shot him in the stomach with a 9mm." (Mendez Br. App. at A39.) Johnny Rodriguez and Suarez both testified that the shooter walked across the street and asked if the cars were fixed, or how are you doing, and then began to shoot. (Tr. 80-84, 157-58 253-55, 296-300, 303.) Thus, Oswaldo had knowledge of the facts underlying his admission.

Finally, there is sufficient independent corroborating evidence of the trustworthiness of Oswaldo's statement for submission to the jury. Oswaldo admitted to both DeLeon and Franklin, who told Perez, that he put out a hit on Johnny Rodriguez. (Mendez Br. App. at A39-40, A42.) In addition, Oswaldo told Detective Straka that he thought Johnny had burglarized his mother's apartment and stolen his money, that he told Matos about it, and that Matos said that he would "take care of it." (Mendez Br. App. at A43.) A number of independent confessions provides "additional corroboration for each." Chambers v. Mississippi, 410 U.S. at 300, 93 S. Ct. at 1048; see also,. e.g., People v. Fonfrias, 204 A.D.2d at 738, 612 N.Y.S.2d at 423 (statement against penal interest is trustworthy where third party stated on four separate occasions that he shot the victim); People v. Smith, 195 A.D.2d at 123, 606 N.Y.S.2d at 663 (an "independent circumstance attesting to the trustworthiness and reliability of [third party's] statements [against penal interest], is the fact that he made five consistent confessions to two individuals . . . within a short time after the murders"). Moreover, Perez saw Oswaldo pay Matos for the hit, and heard Matos say that "if Johnny live[d], he will get hit again." (Mendez Br. App. at A42.) Finally, DeLeon's statement - that Oswaldo had said he wanted to kill Johnny Rodriguez because someone had stolen money from his mother's house and Oswaldo thought it was Johnny because soon after the burglary, Johnny bought a black Mercedes - is supported by Paulino's testimony that Oswaldo's $100,000 had been stolen while he was at Oswaldo's mother's apartment as well as the uncontroverted evidence that Johnny owned a black Mercedes. (§ 440. 10 Tr. 127-30.)

Furthermore, there is no reason to believe that DeLeon, Perez and Paulino were lying when they testified that Oswaldo confessed to putting out the hit on Johnny Rodriguez. DeLeon and Paulino both testified that they did not know Mendez

(§ 440. 10 Tr. 106, 156, 185-86), and there is no evidence that Perez knew Mendez; thus there is no indication that they would lie for Mendez out of friendship or loyalty. Compare, e.g., People v. Shortridge, 65 N.Y.2d 309, 313-14, 491 N.Y.S.2d 298, 310 (1985) (father's confession to murder committed by son inadmissible because of father's strong motivation to fabricate since he was distressed that son might have to spend lifetime in prison); People v. Kennedy, 122 A.D.2d 225, 225, 504 N.Y.S.2d 756, 756 (2d Dep't) (declaration against penal interest inadmissible because of, inter alia, declarant's "obvious intent to exculpate his 'good friend'"), appeal denied, 68 N.Y.2d 915, 508 N.Y.S.2d 1036 (1986); McLean v. McGinnis, 29 F. Supp. 2d 83, 96 (E.D.N.Y. 1998) (third party admission against penal interest inadmissible because: "The only corroborative evidence offered - [witness's] purported identification of [third party] as one of the perpetrators and [other witness's] testimony that [third party], not petitioner, was his accomplice - were not sufficient to overcome the extreme unreliability of an attempt by one of petitioner's friends to exculpate the petitioner by inculpating a dead man."), aff'd, 189 F.3d 461 (2d Cir.), cert. denied, 120 S. Ct. 589 (1999).

Oswaldo's admission that he put out a hit on Johnny Rodriguez was sufficiently reliable to be admissible as an admission against penal interest.

D. Oswaldo Did Not Deny the Hit

The State also claims that since Oswaldo denied putting out the hit on Johnny Rodriguez, the information is not exculpatory. (State Br. at 16.)

In the first instance, Oswaldo admitted to DeLeon and Perez that he put out the hit. (See § 440.10 Tr. 147-56; Mendez Br. App. at A39-40, A42.) Moreover, ADA Moore wrote to Mendez's appellate counsel, "pursuant to Brady v. Maryland,"

that Oswaldo had virtually admitted to Detective Straka that he had put out the hit:

> On August 10, 1994 [ADA Moore] spoke with Detective Stephen Straka . . . He advised me that he had recently spoken with Oswaldo Rodriguez regarding the shooting of "Johnny Rodriguez," and that Oswaldo Rodriguez told him, in sum and substance, about his suspicion that "Johnny Rodriguez" had burglarized his mother's apartment and stolen his money, that he told Alfrato Matos about it, and that Matos said to him, in sum and substance, that he (Matos) would take care of it.

(Mendez Br. App. at A43.)

Although, unsurprisingly, Oswaldo subsequently denied to Mendez's private investigator that he knew who shot Johnny Rodriguez and that he had ordered the hit, he admitted knowing all of the players, except for Mendez, including Johnny Rodriguez, Perez, Matos, DeLeon and Paulino. (§ 440. 10 Tr. 102-03.) Oswaldo admitted to his friends, DeLeon and Perez, that he had ordered the hit and essentially admitted the same to Detective Straka (even though he later denied it to Mendez's private investigator). Thus, there is sufficient evidence that Oswaldo knew about and ordered the hit to leave to the jury the job of determining its weight. See, e.g., People v. Fonfrias, 204 A.D.2d 736, 738,612 N.Y.S.2d 421, 423 (2d Dep't 1994) ("On four separate and distinct occasions [witness] stated that he and not the defendant had shot [victim]. . . . While [witness] subsequently recanted, claiming that he confessed to the crime because he was the defendant's friend and had been pressured by the defendant's family, there clearly were sufficient indicia of reliability to allow the jury, as the finders of fact, to hear evidence of the four earlier confessions, and to

analyze and weigh this evidence, with all other relevant evidence, in reaching its determination."); cf. United States v. Agapito, 620 F.2d 324, 333 (2d Cir.) (government properly relied on witness's confession to establish probable cause for defendants' arrest despite witness's later recantation because "[a] statement against penal interest, especially one that is consistent with all other known information, is more reliable than a statement which seeks to exculpate a person charged with crime."), cert. denied, 449 U.S. 834, 101 S. Ct. 107 (1980).

E. Oswaldo's Admission Would Have Provided Important Investigative Leads

Had Oswaldo's admission (and the related information in the police reports) been promptly disclosed to Mendez and his counsel prior to trial, it would have given them the opportunity to speak to Perez and Matos, two of the most important witnesses who had firsthand knowledge of Oswaldo's hit on Johnny Rodriguez, and who were in police custody at the time. (E.g., Mendez Br. App. at A36-37.) Mendez's private detective was unable to locate either Matos, who actually hired the hit man or men for Oswaldo and was the only person who could positively identify the shooter or shooters, or Perez, who was no longer in the United States but was present when Oswaldo paid Matos to arrange the hit. (See §440.10 Tr. 103-04.) Further, Perez might have testified at Mendez's trial since he was willing to tell Detective Dale that he had observed Oswaldo pay Matos to arrange the hit. (Mendez Br. App. at A42.) Information about who actually carried out the hit on Johnny Rodriguez, together with Oswaldo's motive for ordering the hit, contradicted the prosecution's theory as to why Mendez shot Johnny. Thus, disclosure of Oswaldo's admission would have benefitted Mendez's defense. See, e.g., Smith v. Secretary of New Mexico Dep't of Corrections, 50 F.3d 801, 829-30 (10th Cir.) ("[D]isclosure of [withheld police] report would have alerted counsel to the existence of [alternative suspect's

bloodstained clothing in his trunk and permitted defense counsel] to have it tested. Furthermore, this information, taken together with [alternative suspect's] already existing motive of jealousy, which was established on cross-examination, would have undoubtedly inured to [petitioner's] benefit."), cert. denied, 516 U.S. 905, 116 S. Ct. 272 (1995); Bowen v. Maynard, 799 F.2d 593, 612 (10th Cir.) (finding violation where "in the hands of the defense [suppressed evidence of alternative suspect] could have been used to uncover other leads and defense theories," including alternative suspect's motives for murder, which were different than the State's theory), cert. denied, 479 U.S. 962, 107 S. Ct. 458 (1986); People v. Jackson, 168 Misc. 2d 182, 186, 637 N.Y.S.2d 158,161 (Sup. Ct. Bronx Co. 1995) (Brady violation where, inter alia, witness's suppressed statements "give leads as to other possible perpetrators of the crime"); People v. Lumpkins, 141 Misc. 2d 581, 588, 533 N.Y.S.2d 792, 795-96 (Sup. Ct. Kings Co. 1988) (Brady violation where detective did not investigate Crime Stoppers report implicating alternative suspects, or try to find the two suspects named in it and did not disclose the information to defendant: "[I]t can hardly be doubted that the requirement of due process underlying the Brady rule includes disclosure of exculpatory leads. . . . Perhaps that is why the courts applying the Brady rule have spoken of 'exculpatory information'; 'exculpatory material'; and 'exculpatory matter.'") (citations omitted).

F. The Suppressed Evidence Undercuts the Thoroughness and Good Faith of the Police Investigation

"When . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." Kyles v. Whitley, 514 U.S. 419, 446 n.1 5, 115 S. Ct. 1555, 1572 n.15 (1995). The Supreme Court has therefore held that information which undercuts the

thoroughness and good faith of a police investigation is a factor to be considered in determining whether withheld information is exculpatory. Kyles v. Whitley, 514 U.S. at 445-49, 115 S. Ct. at 1571-73 ("Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for [informer's] various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the [police] investigation, as well."); see also, e.g., Smith v. Secretary of New Mexico Dep't of Corrections, 50 F.3d 801, 830 (10th Cir.) ("while the knowledge the police were investigating [altemative suspect] would arguably carry significant weight with the jury in and of itself, that fact would also have been useful in 'discredit[ing] the caliber of the investigation or the decision to charge the defendant,' factors we may consider in assessing whether a Brady violation occurred"), cert. denied, 516 U.S. 905, 116 S. Ct. 272 (1995); Stano v. Dugger, 901 F.2d 898, 903 & n.28 (11th Cir. 1990); Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir.) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation."), cert. denied, 479 U.S. 962, 107 S. Ct. 458 (1986); Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding new trial because withheld Brady evidence "carried within it the potential . . . [for] the discrediting, in some degree, of the police methods employed in assembling the case against" defendant); United States v. Glover, No. Civ. A. 98-10059-01, 1998 WL 575125 at *4 (D. Kan. Sept. 1, 1998) ("communication of facts which tend to discredit the investigation, within the meaning of Kyles" is "included within the scope of Brady material"); Orena v. United States, 956 F. Supp. 1071, 1100 (E.D.N.Y. 1997) (Weinstein, D.J.) (analyzing Brady claim: "As the O.J. Simpson case and many others demonstrate, destroying the bona fides of the police is a tactic that has never

lost its place in the criminal defense reasonable doubt armamentarium.").

Detective Martinez testified at the § 440.10 hearing that his investigation into the information about Oswaldo consisted only of checking to see if Oswaldo, a drug dealer, reported to his local police precinct that someone stole $100,000 in cash he had stashed in his mother's house. (§ 440.10 Tr. 66.) Since that theft was not reported, Detective Martinez determined that "[i]t didn't have anything to do with the homicide." (§ 440.10 Tr. 66.) Detective Martinez never contacted any of the witnesses who told the Virginia detectives about the hit. (§ 440.10 Tr. 66.)

Mendez argues, however, that it is not surprising that a drug dealer did not report that someone stole $100,000 in cash drug proceeds from his safe. (Mendez Br. at 42.) Moreover, Paulino testified that although he was present during the robbery and was forced to hand over Oswaldo's money at gun point, he did not report the robbery to the police, and to his knowledge, no one else did either. (§ 440. 10 Tr. 131-32.) Detective Martinez could have easily followed up with Paulino, but did not, to see if the robbery occurred, since the Virginia detectives gave him Paulino's address, which Detective Martinez wrote down in his notes. (Mendez Br. App. at A38.) It is also significant that both Detective Martinez and the prosecutor thought that Oswaldo's threat that he would repeat the hit warranted a waming to Johnny Rodriguez, but did not warrant further investigation or notification to the defense. (§ 440. 10 Tr. 65-66.)

Disclosure of the police inaction, as set forth above, could have helped the defense undermine the prosecution's case. For example, after pointing out that Detective Martinez had failed to pursue information that Johnny Rodriguez had been shot in revenge for stealing $100,000 from Oswaldo rather than in revenge for the shooting at Mendez by Johnny's acquaintance,

the defense could have argued that it was easier for the police to charge Mendez with killing Johnny than to search for another killer. See, e.g., Kyles v. Whitley, 514 U.S. at 445-46, 115 S. Ct. at 1571-72 (undisclosed Brady evidence was material because, inter alia, if it had been disclosed, "the defense could have examined the police to good effect on their knowledge of [witness's] statements and so have attacked the reliability of the investigation in failing even to consider [witness's] possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted"); Smith v. Secretary of New Mexico Dep't of Corrections, 50 F.3d at 829-30 (undisclosed police report that alternative suspect was seen near area where victims were found and had bloody clothes in his trunk "would . . . have been useful in 'discredit[ing] the caliber of the investigation or the decision to charge the defendant'"); Bowen v. Maynard, 799 F.2d at 613 (undisclosed Brady evidence was material because, inter alia, it would have demonstrated that police eliminated alternative suspect "even though police knew that he had ample motivation to kill [victim]").

G. The State's Suppression of Information that Oswaldo Ordered a Hit on Johnny Rodriguez Undermines Confidence in the Outcome of Mendez's Trial

The fact that Oswaldo ordered a hit on Johnny Rodriguez "does not, to be sure, prove [Mendez's] innocence, and the jury might have found the eyewitness testimony of [Johnny] and [Suarez] sufficient to convict . . . . But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether [the Court] can be confident that the jury's verdict would have been the same." Kyles v. Whitley, 514 U.S. 419, 453, 115 S. Ct. 1555, 1575 (1995).

Had the suppressed information been disclosed, the jury could reasonably have found that: (1) Oswaldo, who had a clearer motive than Mendez for wanting Johnny killed, hired Matos to arrange for Johnny to be killed, and when the hit failed, again put out a contract on Johnny's life; (2) the New York detective investigating the case was told by two Virginia detectives about this hit, yet did virtually nothing to follow-up on the information; and (3) the prosecutor also knew about the hit and thought that it was serious enough to warrant a warning to Johnny.

The significance of this suppression is heightened by the fact that the State's only evidence of Mendez's guilt was two eyewitnesses, Johnny Rodriguez and Suarez, who immediately after they were shot gave descriptions of the shooter which did not fit Mendez. (Tr. 115-17, 148-49, 314-16, 329-30, 374-77.) The other two eyewitnesses testified that Mendez was not the shooter. (Tr. 259-60, 398.) The State's evidence also consisted of Abreu's statements, but he gave those to Detective Martinez because he thought Detective Martinez would drop the weapons possession charge he faced and he testified at Mendez's trial in the hopes of leniency on his own sentencing. See, e.g., Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir.) ("Where, as here, identity is in issue, a creditable alibi defense is presented, and no physical evidence ties the defendant to the crime, material showing that someone resembling the defendant had motive, opportunity, and ability to commit the crime is 'sufficient to undermine [our] confidence in the outcome'of the trial."), cert. denied, 479 U.S. 962, 107 S. Ct. 458 (1986); Lindsey v. King, 769 F.2d 1034,1042 (5th Cir. 1985); People v. Robinson, 133 A.D.2d 859, 860, 520 N.Y.S.2d 415, 416 (2d Dep't 1987) (finding Brady violation where "there were three witnesses who identified the defendants as the perpetrators, two of whom had seen them on prior occasions. In addition, another witness for the, prosecution testified as to having overheard the defendants discussing their participation

in the crime shortly after the event. Nevertheless, we find that there is a reasonable probability that the result . . . would have been different if the jury had heard testimony from a witness who, in effect, would have identified three other men as the actual perpetrators"); People v. Lumpkins 141 Misc. 2d 581, 591, 533 N.Y.S.2d 792, 798 (Sup. Ct. Kings Co. 1988) (finding Brady violation where "the evidence of the guilt of [defendant] was clear [but] it was not overwhelming").

Lastly, the State essentially admitted that it suppressed exculpatory evidence when ADA Moore, a twenty-four year veteran prosecutor, "disclosed" the suppressed evidence to the defense during the direct appeal, "pursuant to Brady v. Maryland." (Mendez Br. App. at A34 & A43: Moore 7/13/94 & 8/15/94 transmittal letters.)

For all of these reasons, the Court finds that the State withheld Brady evidence so as to undermine confidence in the outcome of the trial, and recommends that Mendez be released unless he is afforded a new trial.

III. THE AEDPA REVIEW STANDARD DOES NOT REQUIRE DENIAL OF HABEAS RELIEF ON MENDEZ'S BRADY CLAIM

In enacting the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, Congress significantly "modifie[d] the role of federal habeas courts in reviewing petitions filed by state prisoners." Williams v. Taylor, 120 S. Ct. 1495, 1518 (2000). The AEDPA imposed a more stringent review standard, as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on

> the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

28 U.S.C. § 2254(d)(1).[11]

The "contrary to" and "unreasonable application" claims of § 2254(d)(1) have "independent meaning." Williams v. Taylor, 120 S. Ct. at 1519. Both, however, "restrict the source of clearly established law to [the Supreme] Court's jurisprudence." Williams v. Taylor, 120 S. Ct. at 1523.

As to the "contrary to" clause,

> A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases. . . . A state-court decision will also be contrary to [the Supreme] Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.

Williams v. Taylor, 120 S. Ct. at 1519-20.

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[11] Section 2254(d)(2), which is not applicable here, allows granting habeas relief if the State decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Here, the State trial judge appeared to apply the Supreme Court's Brady doctrine on facts distinguishable from prior Supreme Court precedent. Thus, the State court's decision cannot be said to be contrary to Supreme Court precedent. That leaves, the "unreasonable application" clause.

In Williams, the Supreme Court explained that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 120 S. Ct. at 1523. However, "[t]he term 'unreasonable' is . . . difficult to define." Id. at 1522. The Supreme Court made clear that "an unreasonable application of federal law is different from an incorrect application of federal law." Id. Rather, the issue is "whether the state-court's application of clearly established federal law was objectively unreasonable." Id. at 1521.[12] See also Van Tran v. Lindsey, No. 98-56251, 2000 WL 622070 at *3-9 (9th Cir. May 16, 2000) (a state's application of federal law must be reversed when "independent review of the legal question does not merely allow [the reviewing court] ultimately to conclude that the petitioner has the better of two reasonable legal arguments but rather leaves [the reviewing court] with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of federal law that the [state] court adopted, was erroneous - in other words that clear error occurred."); Jones v. Stinson, No. CIV. A. 98-CV-3719, 2000 WL

[12] The Supreme Court in Williams did not reach the question of how to treat "'extension of legal principle'" cases under § 2254(d)(1). Williams v. Taylor, 120 S. Ct. at 1521. The Fourth Circuit had held "that state-court decisions that unreasonably extend a legal principle from [Supreme Court] precedent to a new context where it should not apply (or unreasonably refuse to extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s 'unreasonable application' clause." See Williams v. Taylor, 120 S. Ct. at 1521.

567612 at * 17, *20-21 (E.D.N.Y. May 11, 2000),(state court denial of a fair trial claim was "an objectively unreasonable application of the relevant clearly established federal law" where defendant, whose defense to drug sales charges was that he believed vials contained only baking soda, was prevented from testifying about his prior arrests and dismissals for alleged drug sales that turned out to be baking soda).

In Mendez's case, as discussed in Points I and II above, the trial court's decision involved an unreasonable application of the Supreme Court's decision in Brady v. Maryland and its progeny. The evidence that Oswaldo ordered a "hit" on Johnny Rodriguez was favorable to Mendez as both exculpatory and impeaching (both of eyewitnesses Johnny Rodriguez and the police), as required by the Supreme Court's decision in, inter alia, Strickler v. Green, 119 S. Ct. 1936, 1948 (1999). The information could have been used to undercut the thoroughness of the police investigation, a factor recognized by the Supreme Court in Kyles v. Whitley, 514 U.S. 419, 445-49, 115 S. Ct. 1555, 1571-73 (1995). Most importantly, the Court cannot "be confident that the jury's verdict would have been the same" if the Oswaldo evidence had been given to the defense to investigate and use at trial - the test described in the Supreme Court's decision in Kyles v. Whitley, 514 U.S. at 457, 115 S. Ct. at 1575.[13]

Accordingly, under § 2254(d)(1), the trial court's decision on Mendez's claim involved an unreasonable application of Supreme Court precedent, and therefore Mendez's habeas petition should be granted on the Brady issue.

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[13] In addition, to the extent the Fourth Circuit is correct that state-court decisions that "unreasonably refuse to extend a legal principle to a new context where it should apply" involves an "unreasonable application," the trial court's decision here clearly involves such an unreasonable application, for the reasons discussed at length in Point II above.

IV. MENDEZ'S WADE CLAIM IS PROCEDURALLY BARRED AND HIS DUE PROCESS AND CONFRONTATION RIGHTS CLAIMS LACK MERIT

Because the Court herein recommends granting Mendez's habeas petition as a result of the Brady violation, it is not necessary to reach Mendez's remaining claims. Nevertheless, the Court recognizes that this Report and Recommendation will be reviewed by Judge McKenna and likely by the Second Circuit. In order for the reviewing courts to have the most complete recommendation, I address Mendez's remaining claims.

A. Because They Were Not Clearly Articulated in His Application for Leave to Appeal to the New York Court of Appeals, Mendez's Wade Claims Are Not Exhausted and Thus Are Procedurally Barred from Habeas Corpus Review

Section 2254 codifies the exhaustion requirement, providing that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that - (A) the applicant has exhausted the remedies available in the courts of the State. . . ." 28 U.S.C. § 2254(b)(1)(A); see, e.g., O'Sullivan v. Boerckel, 526 U.S. 838, 843-44, 119 S. Ct. 1728, 1731 (1999) ("[t]he exhaustion doctrine . . . is now codified at 28 U.S.C. § 2254 (b)(1)"); Rose v. Lundy, 455 U.S. 509, 515-16, 102 S. Ct. 1198, 1201 (1982) ("The exhaustion doctrine existed long before its codification by Congress in 1948 . . . in 28 U.S.C. § 2254.); Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 512 (1971); Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994), cert. denied, 514 U.S. 1054, 115 So Ct. 1436 (1995); Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 01990); Dave v. Attorney General, 696 F.2d 186, 190-94

(2d Cir. 1982) (en banc).[14] As the Supreme Court has made clear, "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Rose v. Lundy, 455 U.S. at 518, 102 S. Ct. at 1203; accord, e.g., O'Sullivan v. Boerckel, 526 U.S. at 844-45, 119 S. Ct. at 1732; Thomas v. Greiner, 2000 WL 194677 at *3 (& cases cited therein).

The Second Circuit has long held, and the Supreme Court recently confirmed, that "a state prisoner must present his claims to a state supreme [i.e., highest] court in a petition for discretionary review in order to satisfy the exhaustion requirement." O'Sullivan v. Boerckel, 526 U.S. at 839-40, 119 S. Ct. at 1730; accord, e.g., Jordan v. LeFevre, 206 F.3d 196, 198 (2d Cir. 2000); Morgan v. Bennett, 204 F.3d 360, 369 (2d Cir. 2000); Bossett v. Walker, 41 F.3d at 828 ("To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims 'to the highest court of the pertinent state.'"); Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991) ("a petitioner must present his federal constitutional claims to the highest court of the state before a federal court may consider the merits of the petition"); Pesina v. Johnson, 913 F.2d at 54 ("We have held that the exhaustion requirement mandates that federal

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[14] See also, e.g., Forman v. Garvin, 99 Civ. 9078, 2000 WL 631397 at *7 (S.D.N.Y.May 16, 2000) (Peck, M.J.); Thomas v. Greiner, 97 Civ. 2958, 2000 WL 194677 at *2 & n.2 (S.D.N.Y. Feb. 17, 2000) (Peck, M.J.) (& cases cited therein); Cruz v. Greiner, 98 Civ. 7939, 1999 WL 1043961 at *19 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); Marcelin v. Garvin, 97 Civ. 2996, 1999 WL 977221 at *8 (S.D.N.Y. Oct. 26, 1999) (Peck, M.J.); Bond v. Walker, 68 F. Supp. 2d 287, 293 (S.D.N.Y. 1999) (McKenna, D.J. & Peck, M.J.); Avincola v. Stinson 60 F. Supp. 2d 133, 150 (S.D.N.Y. July 9, 1999) (Scheindlin, D.J. & Peck, M.J.); Howard v. Lacy, 58 F. Supp. 2d 157, 162 (S.D.N.Y. 1999) (Sprizzo, D.J. & Peck, M.J.); Orraca v. Walker, 53 F. Supp. 2d 605, 610 (S.D.N.Y. 1999) (McKenna, D.J. & Peck, M.J.); Otero v. Stinson, 51 F. Supp. 2d 415, 420 (S.D.N.Y. 1999) (Baer, D.J. & Peck, M.J.); Gibriano v. Attorney General, 965 F. Supp. 489, 491 (S.D.N.Y. 1997) (Sprizzo, D.J. & Peck, M.J.).

claims be presented to the highest court of the pertinent state before a federal court may consider the petition," citing Daye). Daye v. Attorney General, 696 F.2d at 191 n.3 ("Exhaustion of available state remedies requires presentation of the claim to the highest state court from which a decision can be had."); Foreman v. Garvin, 2000 WL 631397 at *7; Thomas v. Greiner, 2000 WL 194677 at *3 (& cases cited therein).

The Second Circuit determines whether a claim has been exhausted by applying a two-step analysis:

> "First, the petitioner must have fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts. . . . Second, having presented his federal constitutional claim to an appropriate state court, and having been denied relief, the petitioner must have utilized all available mechanisms to secure [state] appellate review of the denial of that claim."

Thomas v. Greiner, 2000 WL 194677 at *3 (quoting Diaz v. Coombe, 97 Civ. 1621, 1997 WL 529608 at *3 (S.D.N.Y. June 12, 1997) (Mukasey, D.J. & Peck, M.J.) (quoting Klein v. Harris, 667 F.2d 274, 282 (2d Cir. 1981)).[15]

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[15] Accord, e.g., O'Sullivan v. Boerckel, 526 U.S. at 84548, 119 S. Ct. at 1732-34; Foreman v. Garvin, 2000 WL 631397 at *7 & n.9; Cruz v. Greiner, 1999 WL 1043961 at *20; Marcelin v. Garvin, 1999 WL 977221 at *8; Lugo v. Kuhlman, 68 F. Supp. 2d 347, 360-61 (S.D.N.Y. 1999) (Patterson, D.J. & Peck, M.J.); Bond v. Walker, 68 F. Supp. 2d at 293; Avincola v. Stinson, 60 F. Supp. 2d at 150; Walker v. Miller, 959 F. Supp. 638, 641 (S.D.N.Y. 1997) (McKenna, D.J. & Peck, M.J.); Boyd v. Hawk, 94 Civ. 7121, 1996 WL 406680 at *3 (S.D.N.Y. May 31, 1996) (Batts, D.J. & Peck, M.J.); Ehinger v. Miller, 928 F. Supp. 291, 293 (S.D.N.Y. 1996) (Mukasey, D.J. & Peck, M.J.).

"The exhaustion requirement is not satisfied unless the federal claim has been

(continued...)

Mendez only raised his Wade claims - that the photo array and lineup were impermissibly suggestive - indirectly before the New York Court of Appeals.[16] Mendez's counsel mentions in his first paragraph of his Leave Application letter: "In connection with the leave application . . ., I am writing to

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[15](...continued)
'fairly presented' to the state courts." Daye v. Attorney General, 696 F.2d at 191; accord, e.g., O'Sullivan v. Boerckel, 526 U.S. at 845, 119 S. Ct. at 1732; Picard v. Connor, 404 U.S. at 275-76, 92 S. Ct. at 512; Jones v. Vacco, 126 F.3d 408, 413 (2d Cir. 1997); Diaz v. Coombe, 1997 WL 529608 at *3. The Second Circuit has held that a federal habeas petitioner must have alerted the state appellate court that a federal constitutional claim is at issue. E.g., Jones v. Vacco, 126 F.3d at 413-14; Grady v. LeFevre, 846 F.2d 862, 864 (2d Cir. 1988); Petrucelli v. Coombe, 735 F.2d 684, 688-89 (2d Cir. 1984); Daye v. Attorney General, 696 F.2d at 191; Diaz v. Coombe, 1997 WL 529608 at *3.

In Daye, the Second Circuit en banc stated:

> [T]he ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Daye v. Attorney General, 696 F.2d at 194; accord, e.g., Levine v. Commissioner of Correctional Servs., 44 F.3d 121, 124 (2d Cir. 1995), cert. denied, 520 U.S. 1106, 117 S. Ct. 1112 (1997); Grady v. LeFevre, 846 F.2d at 864; Garofolo v. Coomb, 804 F.2d 201, 206 (2d Cir. 1986); Diaz v. Coombe, 1997 WL 529608 at *3, Washington v. Superintendent, Otisville Correctional Facility, 96 Civ. 2729, 1997 WL 178616 at *3-4 (S.D.N.Y. April 11, 1997); Boyd v. Hawk, 1996 WL 406680 at *3.

[16] In his letter seeking leave to appeal to the New York Court of Appeals, Mendez clearly raised his claims that the trial court impermissibly admitted hearsay evidence and curtailed cross-examination. (Bernhardt Aff. Ex. 6: Mendez Leave to Appeal Letter at 2-3.) Those claims, therefore, are exhausted. Mendez's Brady claim also is exhausted, having been raised in the trial court pursuant to CPL § 440.10, and the First Department having denied leave to appeal. (See pages 16-20 above.)

supplement the Appellate Division briefs.* (Bemhardt Aff. Ex. 6: Mendez Leave to Appeal Letter at 1.) He then goes on to discuss only the admission of hearsay evidence, curtailed cross-examination and an ex parte conference.

Reference to Mendez's First Department briefs is not sufficient to have exhausted the claims in the New York Court of Appeals. In Grey v. Hoke, 933 F.2d at 120, the petitioner argued one claim in his leave to appeal letter to the New York Court of Appeals, and also attached his Appellate Division briefs, which had raised that issue along with two others. The Second Circuit held that the claims only referred to in his attached briefs were not exhausted:

> Petitioner argues that by attaching his Appellate Division brief to his letter application to the Court of Appeals, he presented that court with an opportunity to rule on his sentencing and prosecutorial misconduct claims. He concedes, however, that his letter application requested that the Court of Appeals review only the search and seizure claim. The letter made no mention of the sentencing and prosecutorial misconduct claims. Under these circumstances, we disagree with petitioner's assertion that the Court of Appeals was presented with his sentencing and prosecutorial misconduct claims.
>
> The fair import of petitioner's submission to the Court of Appeals, consisting of his brief to the Appellate Division that raised three claims and a letter to the Court of Appeals arguing only one of them, was that the other two had been abandoned. The only possible indication that the other two claims were being pressed was the inclusion of a lengthy brief originally submitted

> to another court. This did not fairly apprise the court of the two claims. We decline to presume that the New York Court of Appeals has "a duty to look for a needle in a paper haystack." For a federal court to hold that a state court had the opportunity to rule on a constitutional claim as to which no ruling was requested, and then to rule on the merits of the claim itself, would undermine the very considerations of comity that the rules of exhaustion were designed to protect.

Grey v. Hoke, 933 F.2d at 120 (citations omitted).[17]

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[17] Accord, e.g., Howard v. Lacy, 58 F. Supp. 2d at 162-63 & n.4 (claims procedurally barred where raised before 1st Dep't but not in application for leave to appeal); Cardenas v. Superintendent, Malone Correctional Facility, No. CV-94-5093, 1996 WL 497138 at *3-4 (E.D.N.Y. Aug. 26, 1996) (excessive sentence claim procedurally barred where raised before 2d Dep't but not in application for leave to appeal); DeLeon v. Hanslmaier, No. CV-94-5512, 1996 WL 31232 at *3 (E.D.N.Y. Jan. 19,1996) ("The fact that petitioner attached his brief submitted to the Appellate Division [with his application for leave to appeal to the Court of Appeals] is not enough to satisfy the exhaustion requirement."), aff'd, 104 F.3d 355 (2d Cir. 1996); Figueroa v. Kelly, 95 Civ. 0216, 1995 WL 702327 at *2 (S.D.N.Y. Nov. 29, 1995) ("If a petitioner limits the issues to be reviewed in a letter application to the New York Court of Appeals, the other claims presented in his or her Appellate Division brief are not deemed exhausted under the Lundy requirement . . . [but] should be deemed procedurally forfeited for purposes of federal habeas review where the petitioner is now procedurally barred from presenting those claims to the state court."); McGann v. Kelly, 891 F. Supp. 128, 134 (S.D.N.Y. 1995) ("By failing to raise his ineffective assistance of counsel claim in his leave application, petitioner did not fairly apprise the [N.Y.] Court of Appeals of the factual and legal premises underlying his claim."); Bass v. Scully, 1995 WL 347040 at *3; Lynes v. Mitchell, 894 F. Supp. 119, 123 (S.D.N.Y. 1995), aff'd, 104 F.3d 355 (2d Cir. 1996); Morales v. Keane, No. CV-94-2379, 1995 WL 235222 at *13 n.9 (E.D.N.Y. April 13, 1995); Smith v. Keane, No. CV-94-0514, 1995 WL 87330 at *2 (E.D.N.Y. Feb. 10, 1995); Esquilin v. Walker, No. CV-91-4608, 1992 WL 151903 at *2 (E.D.N.Y. June 16,1992), aff'd, 990 F-2d 624 (2d Cir. 1993); Cornielle v. Riley, No. CV-92-1018, 1992 WL 142009 at *2 (E.D.N.Y. June 16, 1992).

Subsequent decisions extended Grey's rule to situations, like Mendez's, where the application for leave to appeal to the New York Court of Appeals refers to the Appellate Division briefs. For example, in Brooks v. Kelly, No. 88-CV-0631, 1993 WL 350188 at *2 (W.D.N.Y. Sept. 10, 1993), petitioner's application for leave to appeal stated that "'other significant issues are also presented which are thoroughly articulated in'" petitioner's Appellate Division briefs, which were attached. The district court held that the claim was not exhausted:

> For a federal claim to be considered exhausted, it must have been presented to the highest state court. A petitioner is not deemed to have presented a claim to the New York State Court of Appeals simply by attaching an Appellate Division brief without further elaboration of the claim in the petition for leave to appeal. Further, a petitioner has not fulfilled the exhaustion requirement by having made in the application for leave to appeal general reference to claims in the attached appellate brief meriting review.

Brooks v. Kelly, 1993 WL 350188 at *3 (citations omitted).

Similarly, in Thebner v. Miller, 788 F. Supp. 714, 717 (E.D.N.Y. 1992), the petitioner raised one claim in detail in his application for leave to appeal to the New York Court of Appeals, and included the additional sentence that "'[n]umerous other issues are raised in defendant-appellant's brief all of which deserve review by this court.'" The district court held that petitioner's "inclusion in his application to the Court of Appeals of a single sentence which refers, in a general way, to the various claims raised in his sixty-seven page brief to the Appellate Division, is 'insufficient to fairly apprise the Court of Appeals of the factual and legal issues in those

claims." Id. (citing Grey); see also, e.g., Howard v. Lacy, 58 F. Supp. 2d at 164; Benitez v. Senkowski, 97 Civ. 7819, 1998 WL 668079 at *8 n.7 (Cote, D.J. & Peck, M.J.); Qieda v. Artuz, 96 Civ. 5900, 1997 WL 283398 at *3 (S.D.N.Y. May 29, 1997); Morrison v. McClellan, 903 F. Supp. 428, 430 (E.D.N.Y. 1995); Marrero v. Keane, 93 Civ. 3573, 1995 WL 66660 at *1 (S.D.N.Y. Feb. 16, 1995) (reference to "Points I and II" of Appellate Division brief not sufficient under Grey; "[p]resentation requires more than a 'general reference' to the issues presented in an attached brief") (citing Grey v. Hoke, Brooks v. Kelly and Thebner v. Miller.[18]

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[18] But cf. Spence v. Superintendent, Great Meadow Correctional Facility, 987 F. Supp. 151, 161 (E.D.N.Y. 1997) (distinguishes Grey as case where leave to appeal letter "reflect[ed] an abandonment of" the legal claims not directly raised in that letter); Manning v. Artuz, No. 94-CV-3325,1996 WL 294359 at *3-4 (E.D.N.Y. May 29,1996) (distinguishes Grey because the "fair import" of letter application's reference to Appellate Division briefs was "that Petitioner was requesting the New York Court of Appeals to review the same claims that were advanced in the Appellate Division"); Meatley v. Artuz, 886 F. Supp. 1009,1013-14 (E.D.N.Y. 1995) (where no specific claim raised in letter to New York Court of Appeals and Appellate Division briefs were attached to the letter, claims raised in bold headings in those briefs deemed exhausted); Meledez v. Scully, No. CV-91-2497, 1993 WL 41769 at *4 (E.D.N.Y. Feb. 10, 1993) (distinguishes Grey as case of abandonment of claim while Melendez's counsel's leave to appeal letter argued one issue and also stated that he relied on the attached Appellate Division briefs as to other issues).

The Court is not persuaded by these cases. Grey's result should not change merely because the Appellate Division briefs are not only attached to the application for leave to appeal to the New York Court of Appeals but are referred to in that application. To preserve an issue for federal habeas review, the petitioner must present it in the application for leave to appeal to the New York Court of Appeals. Discussion of why appeal should be granted on one issue, and then a passing reference to other issues in enclosed briefs, does not fairly apprise the New York Court of Appeals of the claims to be reviewed. To hold otherwise would require the Court of Appeals to read through lengthy briefs in search of issues deserving of review. In other words, such a holding would create "a duty to look for a needle in a paper haystack." The Court therefore believes the line of cases cited in text above better reflect the Second Circuit's Grey decision. Accord, Howard v. Lacy, 58 F. Supp. 2d at 164

(continued...)

The Second Circuit recently approved of the above reasoning in its decision in Jordan v. LeFevre, 206 F.3d 196, 198-99 (2d Cir. 2000). In affirming Judge Mukasey and my decisions on the exhaustion issue, the Second Circuit "conclude[d], as did the district court, that arguing one claim in [petitioner's leave to appeal] letter while attaching an appellate brief without explicitly alerting the state court to each claim raised does not fairly present such claims for purposes of the exhaustion requirement underlying federal habeas jurisdiction. . . . Counsel may not transfer to the state courts the duty to comb through an applicant's appellate brief to seek and find arguments not expressly pointed out in the application for leave." Id. The Second Circuit therefore affirmed the exhaustion issue "substantially for the reasons set out in [this Court's] thorough Opinion and Order . . . Jordan v. LeFevre, 22 F. Supp. 2d 259, 266-69 (S.D.N.Y. 1998)." Jordan v. LeFevre, 206 F.3d at 199.

The Second Circuit distinguished Jordan from the situation in Morgan v. Bennett, 204 F.3d at 370, where the leave application requested the New York Court of Appeals to "consider and review all issues outlined" in defendant's Appellate Division briefs. See Jordan v. LeFevre, 206 F.3d at 199. Mendez's case is like Jordan, not Morgan, and thus Mendez's reference in his leave to appeal application to his First Department briefs is not sufficient, and his Wade claims are not exhausted.

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[18](...continued)
n.5. As Judge Mukasey stated in adopting my Report and Recommendation in Jordan v. LeFevre, the Eastern District "cases subvert Grey, and also rely on a case that antedates and was implicitly overruled by Grey. . . . Grey controls on the issue of whether grounds for appeal were properly presented in the Court of Appeals." Jordan v. LeFevre, 22 F. Supp. 2d 259, 262 (S.D.N.Y. 1998) (Mukasey, D.J. & Peck, M.J.), aff'd in part & rev'd in part (on other grounds), 206 F.3d 196, 198-99 (2d Cir. 2000).

Mendez, however, would be procedurally barred from raising these claims in the New York Court of Appeals. As the Second Circuit explained in Grey v. Hoke:

> Here, New York procedural rules plainly bar petitioner from attempting to raise (the claims he raised before the Appellate Division but not in his application for leave to appeal] before the New York Court of Appeals. Petitioner cannot again seek leave' to appeal these claims in the Court of Appeals because he has already made the one request for leave to appeal to which he is entitled. See N.Y. Court Rules § 500.10(a). Collateral review of these claims is also barred because the issues were previously determined on the merits on direct appeal. See N.Y. Crim. Proc. Law § 440.10(2)(a); see also N.Y. Crim. Proc. Law § 440.10(2)(c) (barring review if a claim could have been raised on direct review) . . . .
>
> We agree with the state, however, that petitioner's forfeiture in state court of [the claims not adequately raised before the N.Y. Court of Appeals] bars him from litigating the merits of those claims in federal habeas proceedings, absent a showing of cause for the procedural default and prejudice resulting therefrom. Murray v. Carrier, 477 U.S. 478, 492, 106 S. Ct. 2639, 2647 (1986); Wainwright v. Sykes, 433 U.S. 72, 87-91, 97 S. Ct. 2497, 2506-09 (1977). Petitioner makes no showing of cause or of prejudice. The [claims not raised before the Court of Appeals] must therefore be dismissed without reaching the merits.

Grey v. Hoke, 933 F.2d at 120-21; accord, e.g., Foreman v. Garvin, 2000 WL 631397 at *9 & nn. 10-11 (& cases cited therein). A federal court may not reach the merits of a procedurally defaulted claim "unless the habeas petitioner can show 'cause' for the default and 'prejudice attributable thereto,' or demonstrate that failure to consider the federal claim will result in a "'fundamental miscarriage of justice,'" i.e., a showing of "actual innocence." Harris v. Reed, 489 U.S. 255, 262, 109 S. Ct. 1038, 1043 (1989) (citations omitted); accord, e.g., Schlup v. Delo, 513 U.S. 298, 324-27, 115 S. Ct. 851, 865-67 (1995); Coleman v. Thompson, 501 U.S. 722, 735, 111 S. Ct. 2546, 2557 (1991); Jones v. Vacco, 126 F.3d 408, 415 (2d Cir. 1997); Glenn v. Bartlett, 98 F.3d 721, 724 (2d Cir. 1996), cert. denied, 520 U.S. 1108, 117 S. Ct. 1116 (1997); Velasquez v. Leonardo, 898 F.2d 7, 9 (2d Cir. 1990).[19]

Here, Mendez has not alleged cause and prejudice nor has he made a showing of actual innocence. Thus, his Wade habeas claims should be dismissed as procedurally barred.

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[19] See also, e.g., Foreman v. Garvin, 2000 WL 631397 at * 10 & n. 12; Thomas v. Greiner, 2000 WL 194677 at *5 (& cases cited therein); Bond v. Walker, 68 F. Supp. 2d 287, 297 (S.D.N.Y. 1999) (McKenna, D.J. & Peck, M.J.); Avincola v. Stinson, 60 F. Supp. 2d 133, 149 (S.D.N.Y. 1999) (Scheindlin, D.J. & Peck, M.J.); Jordan v. LeFevre, 22 F. Supp. 2d at 266; Torres v. Irvin, 33 F. Supp. 2d 257, 273-74 (S.D.N.Y. 1998) (Cote, D.J. & Peck, M.J.); Williams v. Bennet, No. 97 Civ. 1628, 1998 WL 236222 (S.D.N.Y. April 20, 1998) (Baer, D.J. & Peck, M.J.); Farrington v. Senkowski, 19 F. Supp. 2d 176, 180 (S.D.N.Y. 1998); Cooper v. LeFevre, No. 94-CV-5958, 1998 WL 386340 at *1-2 (E.D.N.Y. July 8, 1998); Gibriano v. Attorney General, 965 F. Supp. 489, 492 n.5 (S.D.N.Y. 1997) (Sprizzo, D.J. & Peck, M.J.); Wells v. LeFevre, 96 Civ. 417, 1996 WL 692003 at *3 (S.D.N.Y. Dec. 2, 1996); Vera v. Hanslmaier, 928 F. Supp. 278, 285 (S.D.N.Y. 1996) (Jones, D.J. & Peck, M.J.); Liner v. Keane, 95 Civ. 2738, 1996 WL 33990 at *7 (S.D.N.Y. Jan. 3, 1996) (Wood, D.J. & Peck, M.J.).

B. Mendez's Due Process and Confrontation Rights Claims Are Not Procedurally Barred

The State argues that Mendez is procedurally barred from raising his constitutional due process and confrontation rights claims because Mendez did not alert the trial court that his hearsay objection to Detective Blackwell's testimony and his objection to the admission of Abreu's written statement rested on federal constitutional grounds. (State Br. at 32-33.) Moreover, the State argues that Mendez's reference to these claims in his First Department brief was insufficient to satisfy the exhaustion requirement. (State Br. at 33-34.) The State characterizes Mendez's references to his Confrontation Clause and due process claims as being contained in a single statement and supported by citations to state law only. (State Br. at 33.)

In fact, Mendez's constitutional arguments to the First Department were written in bold as follows:

POINT II

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE INTRODUCTION OF BOLSTERING HEARSAY TESTIMONY THAT APPELLANT WAS ARRESTED PURSUANT TO INFORMATION FROM AN UNIDENTIFIED INFORMANT, THAT APPELLANT WAS THE SHOOTER, AND BY INTRODUCTION, THROUGH TESTIMONY AND A WRITING, OR A WITNESS' PRIOR CONSISTENT STATEMENT RECOUNTING APPELLANT'S ALLEGED ADMISSION OF GUILT. U.S. CONST., AMEND. XIV; N.Y. CONST., ART. 1, § 6.

* * *

POINT III

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AS WELL AS HIS RIGHT CONFRONTATION AND TO PRESENT A DEFENSE, WHEN THE COURT CURTAILED THE CROSS-EXAMINATION OF A PROSECUTION WITNESS ABOUT WHETHER THAT WITNESS EXPECTED TO BENEFIT IN HIS PENDING CRIMINAL CASES AS A RESULT OF IMPLICATING APPELLANT IN THE INSTANT CASE, AND WHEN THE COURT ADMONISHED COUNSEL IN FRONT OF THE JURY, AND TOLD THE JURY THAT NO DEALS HAD BEEN MADE. U.S. CONST., AMENDS. VI, XIV; N.Y. CONST., ART. 1, § 6.

(Bernhardt Aff. Ex. 1: Mendez 1st Dep't Br. at 33, 40, emphasis added.)

Mendez's reference before the First Department to the Fourteenth and the Sixth Amendments sufficiently raised the federal constitutional nature of Mendez's claim, so these claims are exhausted and ripe for habeas review on the merits. See, e.g., Jones v. Vacco, 126 F.3d 408, 413-14 (2d Cir. 1997) (citing a specific constitutional provision or relying on federal constitutional precedents alerts state courts to the nature of the claim); Levine v. Commissioner of Correctional Servs., 44 F.3d 121, 124 (2d Cir. 1995) ("A habeas petitioner in state court is not required . . . to cite 'chapter and verse' of the Constitution to satisfy the exhaustion rule. . . . Instead, he may fairly apprise the state court of a federal constitutional claim by relying on federal and state cases that employ a constitutional analysis, asserting the claim in terms that 'call to mind a specific right protected by the Constitution,' or alleging facts that fall 'well within the mainstream of constitutional litigation."); Reid v. Senkowski, 961 F.2d 374, 376 (2d Cir. 1992) ("Although we have indicated that 'we think it would be better practice for counsel when relying on a broad constitutional doctrine like the

Fourteenth Amendment to support the claim with a factual premise and by citation to federal cases' a minimal reference to the Fourteenth Amendment satisfies the exhaustion requirement."); Blissett v. LeFevre, 924 F.2d 434, 438 (2d Cir.) ("petitioner's brief to the Appellate Division . . . asserted that he was deprived of his 'due process right to a fair trial' guaranteed by the Fourteenth Amendment. . . . Petitioner's brief clearly laid out the facts underlying his legal claims and his theory. . . . This was more than sufficient to apprise the state appeals court of petitioner's federal constitutional claims."), cert. denied, 502 U.S. 852, 112 S. Ct. 158 (1991); Fernandez v. Dufrain, 11 F. Supp. 2d 407, 415 (S.D.N.Y. 1998) (Kaplan, D.J. & Peck, M.J.) ("Under Second Circuit decisional law . . . reference to the Fourteenth Amendment . . . is sufficient to satisfy the exhaustion requirement," citing cases).

Moreover, the First Department clearly addressed the merits of Mendez's appeal without holding that Mendez procedurally defaulted on any aspect of his claims. See People v. Mendez, 215 A.D.2d 279, 280, 627 N.Y.S.2d 345, 346 (1st Dep't 1995); People v. Mendez, 208 A.D.2d 358, 360, 617 N.Y.S.2d 5, 7 (1st Dep't 1994). Given the First Department's failure to rule on any such procedural bar, there is no procedural bar to Mendez raising his present claim in his habeas petition. See, e.g., Harris v. Reed, 489 U.S. 255, 263 & n.9, 109 S. Ct. 1038, 1043 & n.9 (1989) (when "a state court has been presented with the federal claim," "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case '"clearly and expressly"' states that its judgment rests on a state procedural bar."); Beverly v. Walker, 118 F.3d 900, 902 (2d Cir.), cert. denied, 118 S. Ct. 211 (1997); Glenn v. Bartlett, 98 F.3d 721, 724 (2d Cir. 1996), cert. denied, 520 U.S. 1108, 117 S. Ct. 1116 (1997); Levine v. Commissioner of Correctional Servs., 44 F.3d at 126; Reid v. Senkowski, 961 F.2d at 377; Blazic v. Henderson, 900 F.2d 534, 537-38 (2d Cir. 1990); Rosenfeld v. Dunham, 820 F.2d

52, 54 (2d Cir.) ("if the state appellate court excuses the procedural failure and considers the merits, then a federal court must also consider the merits of petitioner's challenge when ruling on the availability of federal habeas relief"), cert. denied, 484 U.S. 968, 108 S. Ct. 463 (1987).

C. The Trial Court's Admission of Detective Blackwell's Hearsay Testimony Was Harmless Error

The Confrontation Clause of the Sixth Amendment affords the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment's Confrontation Clause is applicable in state criminal trials via the Fourteenth Amendment. E.g., Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 1076 (1965); Pointer v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 1068 (1965); Avincola v. Stinson, 60 F. Supp. 2d 133,153 (S.D.N.Y. 1999) (Scheindlin, D.J. & Peck, M.J.); Mercado v. Stinson, 37F. Supp. 2d 267, 274-75 (S.D.N.Y. 1999) (Baer, D.J. & Peck, M.J.). The primary purpose of the Confrontation Clause is to prevent out-of-court statements from being used against a criminal defendant in lieu of in-court testimony subject to the scrutiny of cross-examination. E.g., Douglas v. Alabama, 380 U.S. at 418-19, 85 S. Ct. at 1076-77; Mitchell v. Hoke, 930 F.2d 1, 2 (2d Cir. 1991); Avincola v. Stinson, 60 F. Supp. 2d at 153-54.

Mendez claims that Detective Blackwell's statement - "We had information that the people . . . Detective Martinez was looking for in his homicide were out in the area of 175th Street and Weeks Avenue in a jeep. . . . We had specific information of what kind of jeep it was and where these people would be. . . . The information . . . received was the whereabouts of - -. . . the people who did the homicide or the person who did the homicide in Detective Martinez's case." (Tr. 233, 234) - was inadmissible hearsay, and alleges that its admission at trial

violated Mendez's confrontation rights. (Mendez Br. at 53-56.) The State admits that Detective Blackwell's statement is hearsay, but argues that its admission was harmless error. (State Br. at 35-36.)

It is settled law that "violations of the confrontation clause may, in an appropriate case, be declared harmless" error. Klein v. Harris, 667 F.2d 274, 290 (2d Cir. 1981), overruled on other grounds by Daye v. Attorney General, 696 F.2d 186, 195 (2d Cir. 1982); see also, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 14380 986) (harmless error applies to Confrontation Clause issue); Yarborough v. Keane, 101 F.3d 894, 896 (2d Cir. 1996) (citing Arizona v. Fulminante, 499 U.S. 279, 307, 111 S. Ct. 1246, 1263 (1991)), cert. denied, 520 U.S. 1217, 117 S. Ct. 1706 (1997); United States v. Aulicino, 44 F.3d 1102, 1109 (2d Cir. 1995) ("Testimony admitted over a defendant's valid Confrontation Clause objection, however, is subject to harmless-error analysis," citing Delaware v. Van Arsdall); Tinsley v. Kuhlmann, 973 F.2d 163, 165-66 (2d Cir. 1992) (holding that any violation of defendant's confrontation rights was harmless), cert. denied, 506 U.S. 1081, 113 S. Ct. 1050 (1993); Mercado v. Stinson, 37 F. Supp. 2d at 277; Ojeda v. Arluz, 96 Civ. 5900, 1997 WL 283398 at *5 (S.D.N.Y. May 29, 1997) ("Confrontation Clause violations are subject to harmless-error analysis" citing Delaware v. Van Arsdall).

In Brecht v. Abrahamson, the Supreme Court held that the appropriate harmless error standard to apply on habeas corpus review of trial errors is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. 619, 638, 113 S. Ct. 1710, 1722 (1993) (quoting

Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)).[20]

In conducting a Confrontation Clause harmless error analysis, the Supreme Court and the Second Circuit have set forth the appropriate factors to consider:

> In conducting this analysis, we must consider (1) how important the witness' testimony was to the prosecution's ca e, (2) whether the testimony was cumulative, (3) whether other evidence in the record corroborated or contradicted the witness on relevant matters, (4) whether other cross-examination of the witness was permitted and the extent of it, and (5) what effect the testimony would have on proof of defendant's guilt. See Van Arsdall, 475 U.S. at 684, 106 S. Ct. at 1438.

Tinsley v. Kuhlmann, 973 F.2d at 166; accord, e.g., Mercado v. Stinson, 37 F.Supp. 2d at 277-78; see also, e.g., Ojeda v. Artuz, 1997 WL 283398 at *5.

Applying the Tinsley factors to this case, the Court finds that the admission of Detective Blackwell's testimony was

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[20] See also e.g., O'Neal v. McAninch, 513 U.S. 432, 439, 115 S. Ct. 992, 996 (1995); Peck v. United States, 106 F.3d 450, 454 (2d Cir. 1997); Peck v. United States, 102 F.3d 1319, 1320 (2d Cir. 1996) (en banc) (Newman, C.J., concurring); Glenn v. Bartlett, 98 F.3d 721, 729 (2d Cir. 1996), cert. denied, 520 U.S. 1108, 117 S. Ct. 1116 (1997); Brewer v. Reynolds, 51 F.3d 1519, 1529-30 (10th Cir. 1995), cert. denied, 516 U.S. 1123, 116 S. Ct. 936 (1996); Mercado v. Stinson, 37 F. Supp. 2d at 277; Tyson v. Keane, 991 F. Supp. 314, 316 (S.D.N.Y.) (Scheindlin, D.J. & Peck, M.J.), aff'd, 159 F.3d 732 (2d Cir. 1998), cert. denied 119 S.Ct. 1270 (1999); Benitez v. Senkowski, 97 Civ. 7819, 1998 WL 668079 at *6 (S.D.N.Y. Sept. 17, 1998) (Cote, D.J. & Peck, M.J.); James v. Senkowski, 97 Civ. 3327, 1998 WL 217903 at *9 (S.D.N.Y. April 29, 1998) (Cote, D.J. & Peck, M.J.); Boyd v. Hawk, 965 F. Supp. 443, 445 (S.D.N.Y. 1997) (Batts, D.J. & Peck, M.J.).

harmless error. First, Detective Blackwell's testimony was immaterial to the prosecution's case. As Mendez points out, Detective Blackwell described only how the police arrested Mendez; he did not testify to Mendez's identity as the shooter. (Mendez Br. at 55.) Further, although Detective Blackwell's testimony was not cumulative, nor was it corroborated or contradicted, Mendez had the opportunity to cross-examine Detective Blackwell and chose not to. (Tr. 234-35.)

Most importantly, the hearsay had no effect on proof of Mendez's guilt. The prosecution's case rested upon Johnny Rodriguez's and Suarez's identification of Mendez as the shooter, as well as Abreu's testimony that Mendez admitted that he shot two or three people; Detective Blackwell's testimony that the police received an anonymous tip as to Mendez's whereabouts and proceeded to arrest Mendez was not pivotal to the prosecution's case. See, e.g., Gochicoa v. Johnson, 118 F.3d 440, 447 (5th Cir. 1997) (admission of hearsay testimony that anonymous informant tipped police that petitioner was buying heroin was harmless error since "the tip from the informant standing alone did not connect [petitioner] to the . . . heroin . . . . Although the informant's tip certainly bolstered the state's case, . . . it was "neither crucial to the prosecution nor devastating to the defense in the context of the trial as a whole"), cert. denied, 118 S. Ct. 1065 (1998); United States v. Tussa, 816 F.2d 58, 66-67 (2d Cir. 1987) (admission of hearsay testimony that an anonymous source told police that defendant carried heroin to the car was error where the "Informant's alleged statement [was] pivotal" to the prosecution's case against that defendant, but was harmless error as to two other defendants where "the question of who delivered the heroin . . . seems relatively insignificant" as to those two defendants). In fact, the prosecutor never made mention of Detective Blackwell's testimony in his summation

(see Tr. 469-91), and thus this was just one insignificant sentence in a 590 page trial transcript.[21]

On these facts, since Detective Blackwell's testimony about the anonymous tipster was offered for background on how Mendez was arrested, the defense had the opportunity to question Detective Blackwell but did not, and the testimony was never referred to again by either the prosecution or the defense and was not pivotal to the prosecution's case, the Confrontation Clause violation was harmless error.

D. The Trial Court's Curtailment of Abreu's Cross-Examination Did Not Violate Mendez's Confrontation Rights

A witness's potential self-interest or bias is one of the principal subjects for cross-examination, and thus a trial court must allow defendant some cross-examination of a prosecution's witness to show self-interest or bias. See, e.g., Henry v. Speckard, 22 F.3d 1209, 1214-15 (2d Cir.) ("The motivation of a witness in testifying, including her possible self-interest and any bias or prejudice against the defendant, is one of the principal subjects for cross-examination. Thus,

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[21] Compare, e.g., Miles v. Burris, 54 F.3d 284, 289-90 (7th Cir. 1995) (admission of police officer's testimony that an anonymous tipster reported that petitioner shot a man was harmless error, even though prosecutor referred to the tip in closing argument, because the jury was unlikely to rely upon the tip as a basis for conviction), with, e.g., Harris v. Wainwright, 760 F.2d 1148, 1151 (11th Cir. 1985) (police officer's hearsay testimony that an anonymous source told him that a yellow Cadillac was involved in an armed robbery, combined with prosecutor's reference to the hearsay in closing arguments, violated petitioner's confrontation rights); Hutchins v. Wainwright, 715 F.2d 512, 517 (11th Cir. 1983) (police officer's testimony that an anonymous source told him that the petitioner committed the crime and where the petitioner lived, combined with prosecutor's reference to the hearsay in closing arguments, violated defendant's confrontation rights), cert. denied, 465 U.S. 1071, 104 S. Ct. 1427 (1984).

though the Confrontation Clause does not deprive the trial judge of all discretion to set limits on the cross-examination of a prosecution witness for potential bias, the court "must allow some cross-examination of a witness to show bias.") (citations omitted), cert. denied, 513 U.S. 1029, 115 S. Ct. 606 (1994); see also, e.g., United States v. Weiss, 930 F.2d 185, 197 (2d Cir.), cert. denied, 502 U.S. 842, 112 S. Ct. 133 (1991); Jones v. Berry, 880 F.2d 670, 673 (2d Cir. 1989) ("Principal subjects for cross-examination include the motivation of the witness in testifying, including possible self-interest. . . ."); Arhin v. New York, 94 Civ. 6921, 1995 WL 672488 at *2 (S.D.N.Y. Nov. 9, 1995); Bosch v. Henderson, 87 Civ. 5800, 1994 WL 561821 at *34 (S.D.N.Y. Oct. 12,1994); Vineski v. Scully, 90 Civ. 2570, 1993 WL 22159 at *7 (S.D.N.Y. Jan. 28, 1993) ("The Second Circuit clearly requires that a defendant be afforded wide latitude in cross-examining a govemment witness in a criminal case. . . . This latitude entities the defendant to explore, during cross-examination, the motivation, of the witness in testifying, including any biases, prejudices, or ulterior motives of the witness as they relate to the case at hand."), aff'd, 29 F.3d 621 (2d Cir.), cert. denied, 513 U.S. 902, 115 S. Ct. 264 (1994); Vasquez v. Henderson, No. CV 89-0823, 1991 WL 17291 at *34 (E.D.N.Y. Jan. 30, 1991), aff'd, 953 F.2d 636 (2d Cir. 1991), cert. denied, 504 U.S. 946, 112 S. Ct. 2289 (1992).

While "[a] complete bar on examination into bias would impermissibly deny the jury information 'central to assessing [the witness's] reliability,'" Henry v. Speckard, 22 F.3d at 1215 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 677, 679, 106 S. Ct. 1431, 1434, 1435 (1986)), the Second Circuit has repeatedly held that "'[c]ross-examination is not improperly curtailed if the jury is in possession of facts sufficient to make a "discriminating appraisal" of the particular witness's credibility.'" United States v. Rosa, 11 F.3d 315, 336 (2d Cir. 1993) (citing United States v. Roldan-Zapata, 916 F.2d 795, 806 (2d Cir. 1990), cert. denied, 499 U.S. 940, 111 S. Ct. 1397 (1991)),

cert. denied, 511 U.S. 1042, 1096, 114 S. Ct. 1565, 1864 (1994); accord, e.g., Arhin v. New York, 1995 WL 672488 at *2; Bosch v. Henderson, 1994 WL 561821 at *4; Vineski v. Scully, 1993 WL 22159 at *7. Moreover, "the Confrontation Clause does not prohibit the trial judge from setting any limits whatever on the cross-examination of a prosecution witness for potential bias. The court retains 'wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, . . . interrogation that is repetitive or only marginally relevant.'" Jones v. Berry, 880 F.2d at 673 (quoting Delaware v. Van Arsdale, 475 U.S. at 679, 106 S. Ct. at 1435).[22]

Even if the reviewing court determines that the trial judge improperly curtailed cross-examination, however, harmless error analysis remains applicable:

> When a reviewing court concludes that the trial judge has improperly curtailed cross-examination, in violation of the defendant's confrontation rights, it should not reverse automatically but should instead apply harmless-error analysis. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless . . . ."

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[22] See also, e.g., Henry v. Speckard, 22 F.3d at ' 1214 ("though the Confrontation Clause does not deprive the trial judge of all discretion to set limits on the cross-examination of a prosecution witness for potential bias, . . . the court 'must allow some cross-examination of a witness to show bias'") (citations omitted); United States v. Rosa, 11 F.3d at 335-36 ("The scope and extent of cross-examination are generally within the sound discretion of the trial court, and the decision to restrict cross-examination will not be reversed absent an abuse of discretion."); Hargrove v. Kelly, No. 96-CV-5678, 1998 WL 635710 at *5-6 (E.D.N.Y. Feb. 9,1998), aff'd, 164 F.3d 618 (2d Cir. 1998); Arhin v. New York, 1995 WL 672488 at *2; Bosch v. Henderson, 1994 WL 561821 at *4; Vineski v. Scully, 1993 WL 22159 at *7.

Henry v. Speckard, 22 F.3d at 1215 (quoting Delaware v. Van Arsdall, 475 U.S. at 684, 973 F.2d 1438); see also, e.g., Tinsley v. Kuhlmann, 973 F.2d 163, 165-66 (2d Cir. 1992), cert. denied, 506 U.S. 1081, 113 S. Ct. 1050 (1993); Harper v. Kelly, 916 F.2d 54, 57 (2d Cir. 1990), cert. denied, 499 U.S. 943, 111 S. Ct. 1403 (1991); United States v. Towne, 870 F.2d 880, 886-87 (2d Cir.), cert. denied, 490 U.S. 1101, 109 S. Ct. 2456 (1989).

Mendez claims that the trial judge impermissibly curtailed his cross-examination of Abreu as to his motives for testifying against Mendez.[23] (Mendez Br. at 56-65.)

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[23] Mendez also claims that the trial court erroneously permitted Abreu to read into the record his statement to Detective Martinez concerning Mendez's alleged confidences. (Mendez Br. at 61-62.) The Court need not decide whether the admission of Abreu's statement was erroneous; evidence admission issues, such as this, generally are matters of state law not cognizable under the United States Constitution, and therefore not a basis on which the court may grant a habeas petition. See, e.g., Benitez v. Senkowski, 97 Civ. 7819, 1998 WL 668079 at *4 (S.D.N.Y. Sept. 17, 1998) (Cote, D.J. & Peck, M.J.), & cases cited therein.

Specifically, "[a]lthough bolstering is a practice prohibited in various states, including New York, the practice is not forbidden by the Federal Rules of Evidence and is not sufficiently prejudicial to deprive a defendant of his due process right to a fair trial." Vega v. Berry, 90 Civ. 7044, 1991 WL 73847 at * 1 (S.D.N.Y. April 29,1991) (footnote omitted); accord, e.g., Benitez v. Senkowski, 1998 WL 668079 at *5. Judge Weinfeld explicitly held that "this Circuit has never regarded the practice [of bolstering] as inimical to trial fairness." Orr v. Schaeffer, 460 F. Supp. 964, 967 (S.D.N.Y. 1978) (Weinfeld, D.J.); see also, e.g., Benitez v. Senkowski, 1998 WL 668079 at *6 (quoting Judge Weinfeld); Harris v. Hollins, 95 Civ. 4376, 1997 WL 633440 at *3 (S.D.N.Y. Oct. 14, 1997) (petitioner's bolstering claim "failed to state a federal constitutional claim. 'The concept of "bolstering" really has no place as an issue in criminal jurisprudence based on the United States Constitution. It is at most a New York State rule or policy, . . . [v]iolation of [which] does not rise to a constitutional level.'"); Malik v. Khoenan, 94 Civ. 8084, 1996 WL 137478 at *4 (S.D.N.Y. March 26, 1996) ("A claim of bolstering is not a federal constitutional claim cognizable on habeas review."); Connolly v. Artuz, No. 93 CV 4470, 1995 WL 561343 at *7-8 (E.D.N.Y. Sept. 15, 1995); Styles v. Van Zandt, 94 Civ. 1863, 1995 WL 326445 at *5 (S.D.N.Y. May 31, 1995) ("a claim

(continued...)

On cross-examination, defense counsel asked Abreu repeatedly about what sort of treatment he expected when he made his statement to Detective Martinez:

> Q I'm asking about your state of mind. When you made the statement that you made, did you think that Detective Martinez would dismiss the new gun charge against you in return for your making that statement?
> A Well, it was under that promise that I said that.
> Q So when you made the statement it wasn't to be a good citizen or to reveal to the law enforcement authorities a bad thing that you knew about as a good citizen but was done to help yourself to get rid of the new gun case; is that what it was?

(Tr. 193.) The prosecutor's objection was sustained. (Tr. 193.) Defense counsel continued:

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[23](...continued)
of improper 'bolstering' is not a cognizable basis of federal habeas relief"), aff'd, 101 F.3d 684 (2d Cir.), cert. denied, 117 S. Ct. 313 (1996); Ortiz v. New York, 93 Civ. 3062, 1993 WL 187875 at *1 (S.D.N.Y. May 25, 1993) ("A claim of 'bolstering' is not a federal constitutional claim cognizable on habeas review."); Battee v. Williams, No. 91-CV-0154, 1993 WL 117530 at *3 (W.D.N.Y. April 8, 1993) ("Bolstering is at most a state law evidentiary concept . . . and violation of that evidentiary rule does not rise to a federal constitutional level."); Billups v. Costello, 91 Civ. 6296,1992 WL 170650 at *4 (S.D.N.Y. July 6,1992); Cao v. Mann, 89 Civ. 5312, 1990 WL 89363 at *4 (S.D.N.Y. June 18, 1990); Ayala v. Hernandez, 712 F. Supp. 1069, 1074 (E.D.N.Y. 1989); Snow v. Reid, 619 F. Supp. 579, 582 (S.D.N.Y. 1985) ("The concept of 'bolstering' really has no place as an issue in criminal jurisprudence based on the United States Constitution. It is at most a New York State rule or policy. . . . Violation of that rule . . . does not rise to a constitutional level.").

Q You didn't make that statement because you were being a good citizen, did you?
A (pause) Well, I'm not a bad citizen either, but I don't want to be involved in that.
. . . .
Q But as Miss Sharpe [the prosecutor) had asked you on direct examination, no one was accusing you about any shooting, were they?
A No.
Q You thought that you would be helping yourself get rid of the new gun case, didn't you, by giving them a statement that they wanted?

(Tr. 194.) The prosecutor's objection was sustained. (Tr. 194.) Defense counsel then asked: "Did you think that you were telling the police something that they wanted to hear?" The prosecutor's objection was overruled (Tr. 194), and Abreu answered:

A Well, I was - I was telling them something they wanted to hear, but I also didn't want to be involved in this - that gun was in a jeep, and the jeep was not mine. I was not driving the jeep either.
. . . .
Q But in your mind at the time that you were approached by Detective Martinez you thought that you would somehow be involved in the shooting if you didn't make some statement to the police; is that what your state of mind was, sir?
A Yes, because we were together.
Q But the statement was truthful?
. . . .
A Yes.

(Tr. 195, 197.) Defense counsel asked Abreu about his weapons conviction in Manhattan (Tr. 197-203), and then asked Abreu whether the Bronx prosecutor had promised to drop the Bronx weapons charge if Abreu testified at Mendez's trial:

> Q You say this D.A. made no promises to get rid of your Bronx case to you; is that what your testimony is, sir?
> MS. SHARPE [the Prosecutor]: Objection.
> THE COURT: Objection sustained.
> And I can sit here and tell this jury this case is in my Part and I am not privy to any promises made. . . and I have made no promises to this defendant period.
> Next question . . . .

(Tr. 204, emphasis added.) At the prosecution's request, the trial judge held a conference in the robing room and explained that no deal had been made and he would not permit questioning about any deal:

> THE COURT: From now on, I am going to keep [you] at arm's length. I thought - you had my word. You didn't accept my word.
> What you've done, you've placed the issue as if I am now involved in a -
> MR. KAISER [Defense Counsel]: No, I haven't.
> THE COURT: Yes, you have. Don't you understand that what you've done is that you've put in the eyes of the [jury] that something is going on and I am privy to something that they don't hear?
> . . . .
> MR. KAISER: No one is doubting that the Court and the D.A. made no promise to this . . .witness.

> The witness' state of mind - your Honor, it is the witness' state of mind that is the important issue.
> THE COURT: I see.
> MR. KAISER: Whether he thinks he's helping himself by testifying.
> THE COURT: I've given you plenty of leeway, sir. . . .
> MR. KAISER: I didn't mean to impugn -
> THE COURT: Well, you certainly have. . . .
> . . . .
> MR. KAISER: I was just trying to bring out how the witness thinks he can earn something for himself.

(Tr. 204-07, emphasis added.)

After the conference, defense counsel resumed questioning Abreu:

> Q Did you think, Mr. Abreu, did you think in your mind that you were helping yourself in your gun case here in the Bronx because you haven't plead guilty to it and there is no promise one way or the other about six months or a year or what have you by testifying here in court?

(Tr. 208.) The prosecutor's objection was sustained. (Tr. 208.) Defense counsel continued:

> Q Did Miss Sharpe ask you on direct examination whether your cooperation in this case would be made known to [Judge Covington] (who was Mendez's trial judge and the judge assigned to Abreu's Bronx case) on your Bronx case?
> THE COURT: Just a moment.

Let me interrupt. I find that questioning rather stupid to my mind. I'm not the trier of the facts -I'm the judge sitting in this case. Nothing has to be made known to me, counselor, and I just spoke with this jury.
I just told this jury, all 15 of them, that I have made no promises to this defendant. I've made no promises to his lawyer.
MR. KAISER: No one said -
THE COURT: No, you're suggesting that there might be an understanding.
I'm telling you that there has been no understanding. There's been no discussion by this Court with respect to this defendant or his lawyer with respect to any deal quote deal end of quote period.
Next question, sir.
Q Do you not think that you're helping yourself?
A If I'm helping myself?
Q By testifying here?
A This is not my case. I could fight my case for a year or two. I have my attorney.
Q And you don't think that you're helping yourself in any way on your case?

(Tr. 209-10, emphasis added.) Without an objection from the prosecutor, the judge said "Objection sustained. Already asked and answered. Let's move along." (Tr. 210.) Defense counsel was unable to ask Abreu any more questions on the subject. (Tr. 210-11.)

Despite the trial judge's abridgment of Mendez's cross-examination into Abreu's motives for testifying, Abreu testified on direct-examination that after he was arrested, he spoke with Detective Martinez, who promised Abreu he would

drop the weapons charges if Abreu told him what Mendez had said about the shooting. (Tr. 181-82, 192.) On both direct and cross-examination, Abreu testified that he had told Detective Martinez what Mendez had allegedly said about the shooting because he thought Detective Martinez would drop the weapons possession charges. (Tr. 181-83, 192.)

Abreu also testified that the weapons possession charges brought against him were pending before the judge who was presiding over Mendez's trial, but that neither the prosecutor nor the judge had made him any promises with respect to his testimony against Mendez, although Abreu felt it could have some bearing on the sentence he would receive in his weapons possession case. (Tr. 176-79, 185-86.) In addition, Abreu testified that his "cooperation in testifying" would "be made known to the judge before whom" his case was pending. (Tr. 185.)

The jury therefore had an abundance of information before it indicating that Abreu had substantial self-serving motives to testify against Mendez.

In situations like this, where the trial judge curtailed defense counsel's cross-examination of a witness (here, Abreu) regarding his motives for testifying, but the pertinent information regarding the witness's motives for testifying was before the jury, some cases hold that the error violates petitioner's Confrontation Clause rights, but that it is harmless,[24] while other cases hold that since the pertinent

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[24] See, e.g., Henry v. Speckard, 22 F-3d at 1215-16 (Confrontation Clause violated where defendant not permitted to question state witness about motivation for claiming defendant raped her, but error was harmless because defendant's attorney "was allowed to probe [witness's] version of the events thoroughly and intensively; in his summation, he argued that he had elicited numerous inconsistencies. He was also given wide latitude to ask [witness]

(continued...)

information was before the jury, the petitioner's confrontation rights were not violated.[25]

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[24](...continued)
other questions probing her bias or potential motivation to lie."); United States v. Brown, 938 F.2d 1482, 1488 (1st Cir.) (defense counsel should have been allowed to question witness about whether he had struck a cooperation deal with the government which could provide future benefit and therefore might evidence witness bias, but "the error was rendered harmless because defendant's theory regarding a deal between [witness] and the government was manifested to the jury through the testimony which was allowed"), cert. denied, 502 U.S. 992, 112 S. Ct. 611 (1991); United States v. Towne, 870 F.2d at 886-87 ("We believe that the district judge should have allowed defense counsel to cross-examine [witness] regarding his motives for testifying against [defendant]. The judge's decision not to allow counsel's examination because there was no official 'deal' between federal prosecutors and [witness] was erroneous," but the violation was harmless because, inter alia, witness "was both extensively and effectively cross-examined on all other relevant points" and defendant "fails to demonstrate how the error was prejudicial or harmful to his defense."); see also, e.g., Williams v. Kelly, No. 88 Civ. 325, 1989 WL 83399 at * 1-3 & n. 1 (E.D.N.Y. July 12, 1989) (court erred in prohibiting defendant from cross-examining witness on conviction for his role in the crime, but error was harmless since "it did permit the defense to 'ask [witness] about his complicity with this defendant or anybody else in regards to his testimony.").

[25] See, e.g., United States v. Weiss, 930 F.3d at 198 (no confrontation rights violation where defendant not permitted to cross-examine state's witness to expose animosity where evidence of animosity was before the jury); United States v. Ciro, 753 F.2d 248, 249 (2d Cir.) (no confrontation rights violation where defendant not permitted to cross-examine state's witness about his probationary status, because "the defense had ample, evidence, absent the juvenile adjudication, with which to impeach the witness' credibility in general and bias in particular"), cert. denied, 471 U.S. 1018, 1057, 105 S. Ct. 2125, 2122 (1985); United States v. Singh, 628 F.2d 758, 763-64 (2d Cir.) (no confrontation rights violation where defendant not permitted to cross-examine state's witnesses about how long they were taken into and remained in custody, and whether they submitted fraudulent documents to the INS, where it was established that witnesses were illegal aliens and deportable), cert. denied, 449 U.S. 1034, 101 S. Ct. 609 (1980); Hargrove v. Kelly, 1998 WL 635710 at *6 (no confrontation rights violation where defendant not permitted to cross-examine state's witness about whether he wanted to bring the investigation to a close to minimize risk that his own

(continued...)

The Court need not determine whether there was no constitutional error or there was error but it was harmless. Under either analytical approach, since information about Abreu's, potential self-serving interest in testifying against Mendez was before the jury, Mendez is not entitled to any relief because of the trial court's limitation on Mendez's cross-examination of Abreu.

CONCLUSION

For-the reasons set forth above, because the State failed to disclose materially exculpatory evidence as required by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1987), and its progeny, thus undermining confidence in the outcome of Mendez's trial, the Court should grant Mendez's habeas petition solely on that ground. Because Mendez's Wade claims are procedurally

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[25](...continued)
illegal activities might become subject to inquiry because "defense counsel attacked the overall credibility of [the witness] on a number of fronts"); Lee v. Harris, 91 Civ. 6716, 1992 WL 247037 at *3 (S.D.N.Y. Sept. 16, 1992) ("it was within the discretion of the trial judge to limit the cross-examination . . . since the jury was already in possession of sufficient information to make a discriminating appraisal of each . . . witness' possible motives for testifying falsely in favor of the government"); Arhin v. New York, 1995 WL 672488 at *2 (no confrontation rights violation where "the jury was in possession of sufficient facts concerning [witness's] reluctance to testify to make a discriminating appraisal of her credibility"); Bosch v. Henderson, 1994 WL 561821 at *4 (no confrontation rights violation where trial counsel was not denied an opportunity to call into question state's witness's motivation for testifying or his veracity); Vineski v. Scully, 1993 WL 22159 at *7 ("trial court did not abuse its discretion in imposing limits on the scope of cross-examination" because "defense counsel's questioning and summation revealed [State's witness's] strong prosecution orientation and alerted the jury to any potentially unreliable conclusions"); Vasquez v. Henderson, 1991 WL 17291 at *4 (no Confrontation Clause violation where "defense counsel extensively questioned [State's witness] about her and her daughter's cooperation agreements with the district attorney. The owner admitted that she understood that she and her daughter might receive more lenient treatment from the prosecution in exchange for her testimony").

barred, and the trial court did not violate his due process or confrontation rights by admitting hearsay testimony or curtailing his cross-examination of Abreu's testimony, I recommend that Mendez's petition be denied as to these claims.[26]

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lawrence M. McKenna, 500 Pearl Street, Room 1640, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge McKenna. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 2981 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir.

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[26] In the event the Court were to disagree with this recommendation, I would recommend that Mendez be granted a certificate of appealability, limited to the Brady issue. See Slack v. McDaniel, 120 S. Ct. 1595, 1599 (2000) (certificate of appealability should issue where "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further"); Lucidore v. New York State Div. of Parole, 209 F.3d 107, 112 (2d Cir. 2000) (certificate of appealability should issue "if the issues involved in a petition are debatable among jurists of reason, could be resolved in a different manner, or are adequate to deserve encouragement to proceed further").

1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

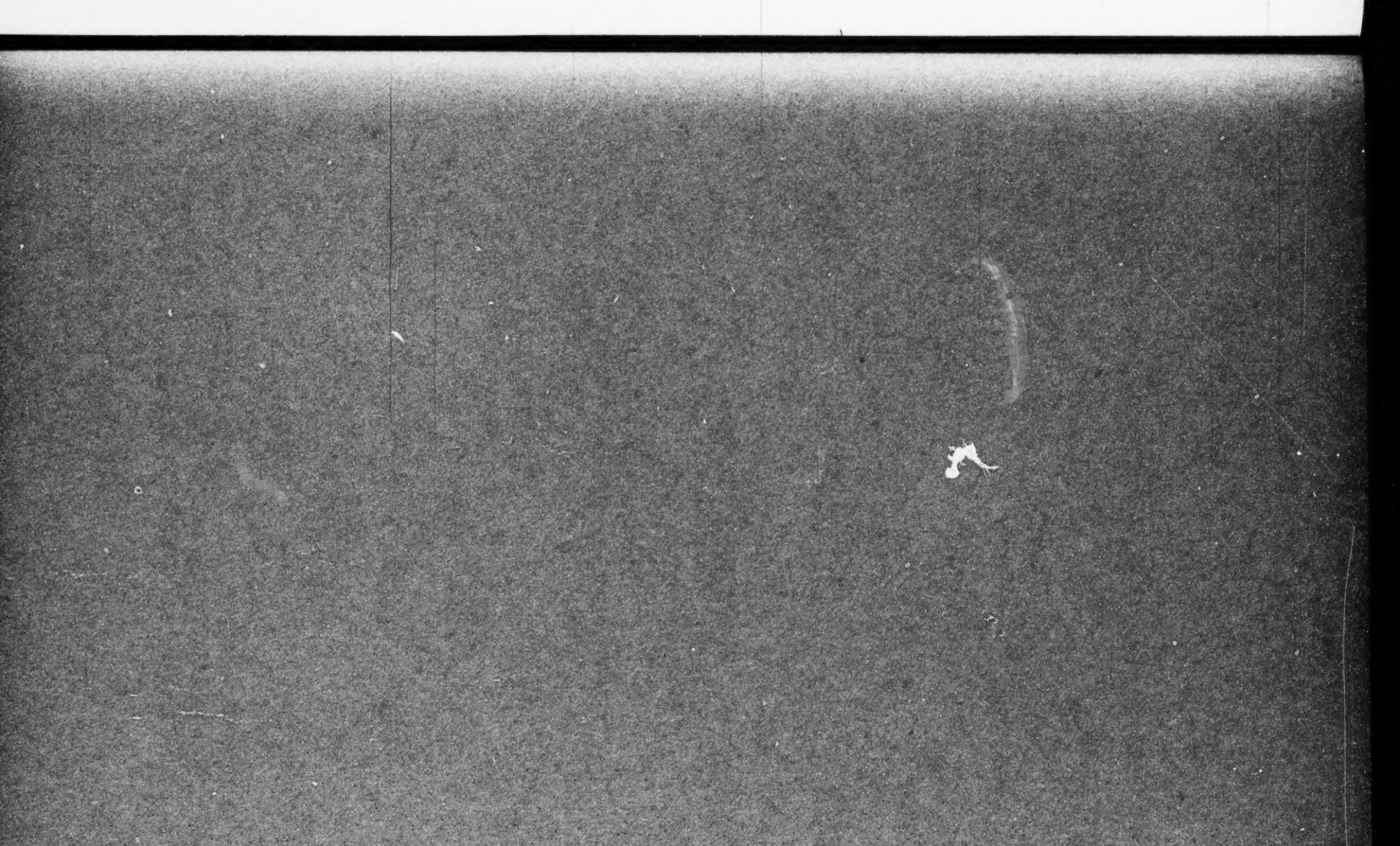
DATED: New York, New York
June 6, 2000

Respectfully submitted,

s/Andrew J. Peck
Andrew J. Peck
United States Magistrate Judge

Copies to:
Kannan Sundaram, Esq.
Elizabeth Farber Bernhardt, Esq.
Judge Lawrence M. McKenna

Appendix D—Decision of George D. Covington, J.S.C., dated December 12, 1996



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM, PART 34

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

IND. # 6453/90
DECISION

HILDEN MENDEZ

Defendant

----------x

COVINGTON, J.:

Defendant moves to vacate his conviction and for an order granting a new trial pursuant to C.P.L. 440.10 on the ground that the People failed to disclose, at, or prior to trial, certain documents to the defense which qualified as Rosario or Brady material. The People oppose this motion and assert that the alleged Rosario/Brady material is at best, an investigatory "lead" which is, hearsay and inadmissible.

This court held a fact-finding hearing which spanned a period of four days (April 26, May 3 & 17 and June 7, 1996). At the conclusion of the hearing both parties were given an opportunity to make additional submissions. Having reviewed all submissions by both parties as well as the record of the hearing, this court decides the within motion as set forth below.

CHRONOLOGY

On April 13, 1992 defendant was convicted, after a jury trial, of Murder in the Second Degree, Attempted Murder in the Second Degree, Assault in the Second Degree, and Criminal Possession of a Weapon in the Second Degree, and was

subsequently sentenced, as a predicate felony offender, to concurrent indeterminate terms of imprisonment of from 25 years to life, 12 ½ years to 25 years, 3 ½ years to 7 years and 7 ½ years to 15 years, respectively.

On May 6, 1992 defendant filed a *pro se* motion to vacate his judgment of conviction pursuant to C.P.L. 440.10, which was denied by this court on July 6, 1992.

On August 3, 1993, defendant filed a second motion to vacate his judgment of conviction pursuant to C.P.L. 440.10, which was subsequent denied by this court.

As a result of defendant's direct appeal to the Appellate Division, First Department this court was obligated to conduct a reconstruction hearing which was conducted on January 13, 1995. On May 23, 1995 the Appellate Division unanimously affirmed defendant's conviction.

On September 14, 1995, defendant filed the within *pro se* motion which resulted in the aforementioned evidentiary hearing.

ROSARIO

Turning first to the alleged Rosario violation this court is of the opinion that there was not any Rosario violation. The material referred to by the defendant does not constitute Rosario material since it is not a prior statement of a person called as a witness at trial. The notes of Detective Martinez did not constitute his own prior statement. The notes contained a statement made by another individual (Romull Alberto DeLeon) which alleged that yet another individual (Oswaldo Daniel Rodriguez) claimed to have ordered a "hit" on Johnny Rodriguez. Neither DeLeon or Rodriguez were called as

witnesses by the People at trial, thus, their prior statements are not Rosario *People v. Ray*, 140 A.D. 2d 380.

Moreover, the statement in question is a hearsay statement. Rosario material has never encompassed hearsay, rumor, or gossip attributable to a witness, that somehow finds its way into police files *People v. Williams*, 165 A.D. 2d 839 (1990).

Likewise, the handwritten notes of the prosecutor regarding her conversation with Detective Martinez about his conversation with Mr. DeLeon about the purported statement of Oswaldo Rodriguez does not constitute Rosario material. The notes in question do not constitute a prior written statement by a witness called by the prosecution at trial and further, constitute triple hearsay, *People v. Williams*, 165 A.D. 2d 839.

BRADY

Turning next to the BRADY, issue, this court is of the opinion that there wasn't any BRADY violation. Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution has a duty to disclose evidence in its possession that is both favorable and material to the defense. The notes of the prosecutor and Detective Martinez were not favorable to the defense and did not tend to exculpate defendant of the charges. The value of the notes lies solely in their nature as a possible "investigatory lead." A "lead" itself is not exculpatory. In the instant case the "lead" advances the idea that possibly someone else (Oswaldo Daniel Rodriguez may have wanted to kill Johnny Rodriguez, who was injured in the incident which resulted in the defendant being charged with Murder 2° and related charges.

It is entirely possible that this lead is totally unrelated to the incident involving this defendant, or that this defendant was,

in fact, carrying out the purported "hit." In any event, this lead, standing by itself, does not in any way tend to exculpate the defendant. Moreover, the hearsay nature of the statement contained in the notes and the requirements that must be met to qualify this statement as a declaration against penal interest makes its admissibility at trial extremely doubtful, *People v. Settles*, 46 N.Y. 2d 154 (1978); *People v. Shortridge*, 65 N.Y. 2d 309 (1985).

Therefore, defendant's motion to vacate his conviction and for an order granting a new trial is most respectfully DENIED. This shall constitute the decision and order of this court.

DATE: December 12, 1996

s/George D. Covington
George D. Covington, J.S.C.

Appendix E—Certificate Denying Leave dated April 15, 1997

STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE : Hon. PETER TOM,
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

HILDEN MENDEZ,
Defendant.

M-795
CERTIFICATE
DENYING
LEAVE

Indictment No.
6453/90

----------x

I, PETER TOM, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant (by notice of appeal) for a certificate pursuant to Section 460.15 of the Criminal Procedure Law, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department and permission to appeal from the order of the Supreme Court, Bronx County, entered on December 12, 1996, is hereby denied.

Dated: New York, New York
April 15, 1997.

s/ Peter Tom
PETER TOM Justice